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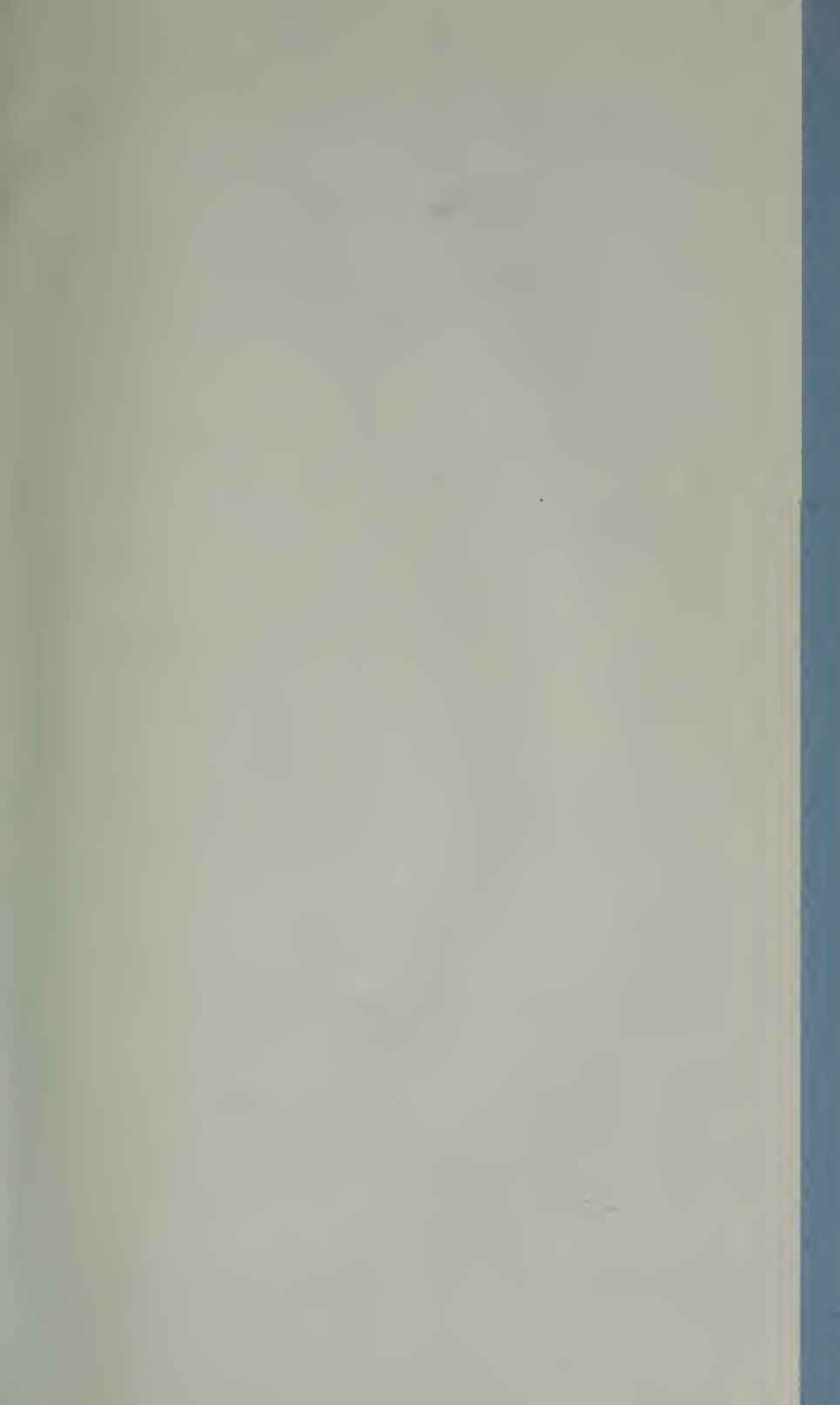
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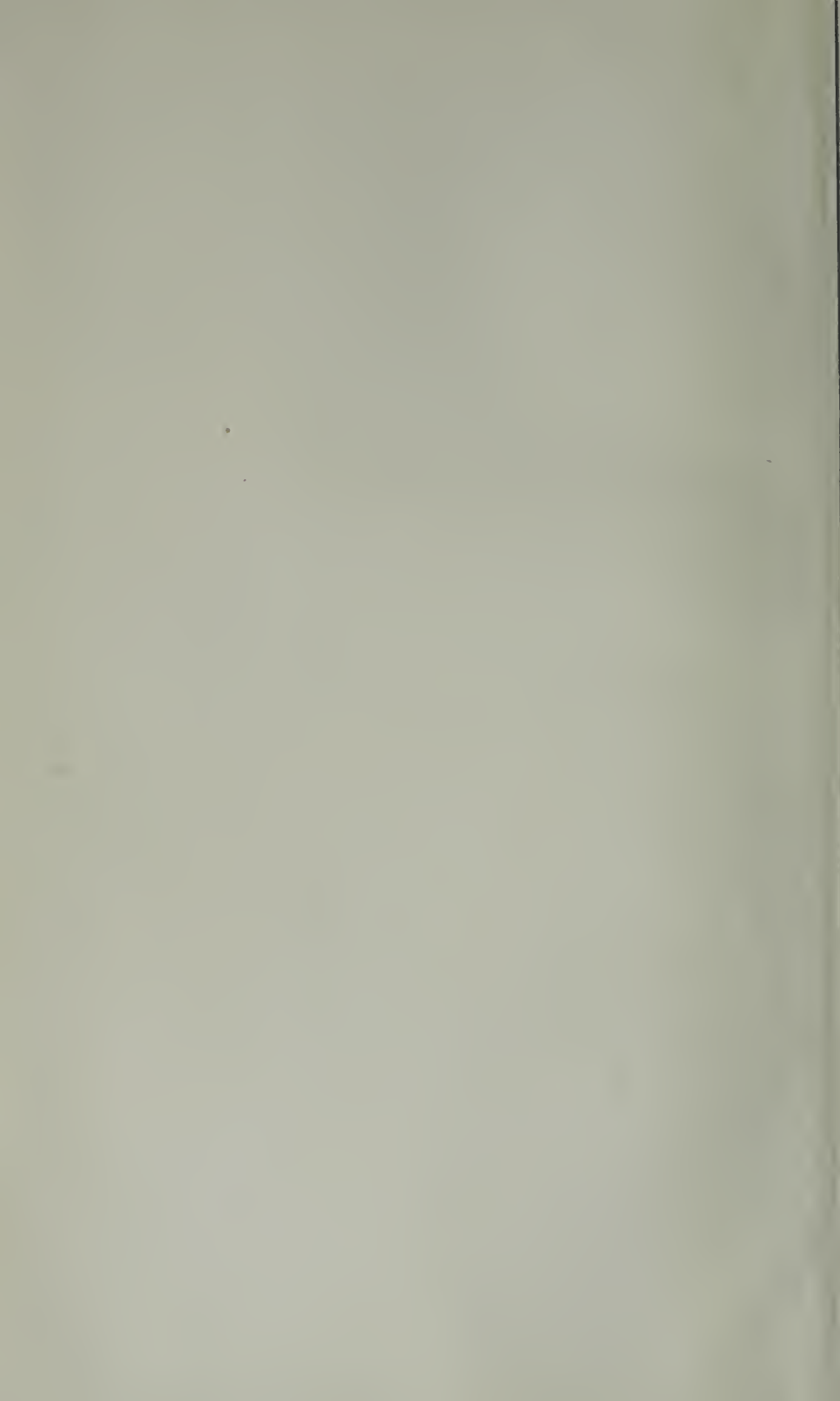
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N. 2915

No. 14554

**United States
Court of Appeals**
For the Ninth Circuit.

AERIAL LUMBER COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

FILED

MAR 10 1955

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 2-18-55 **CLERK**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

RAYMOND D. TORBENSON, and
RICHARD M. THATCHER,

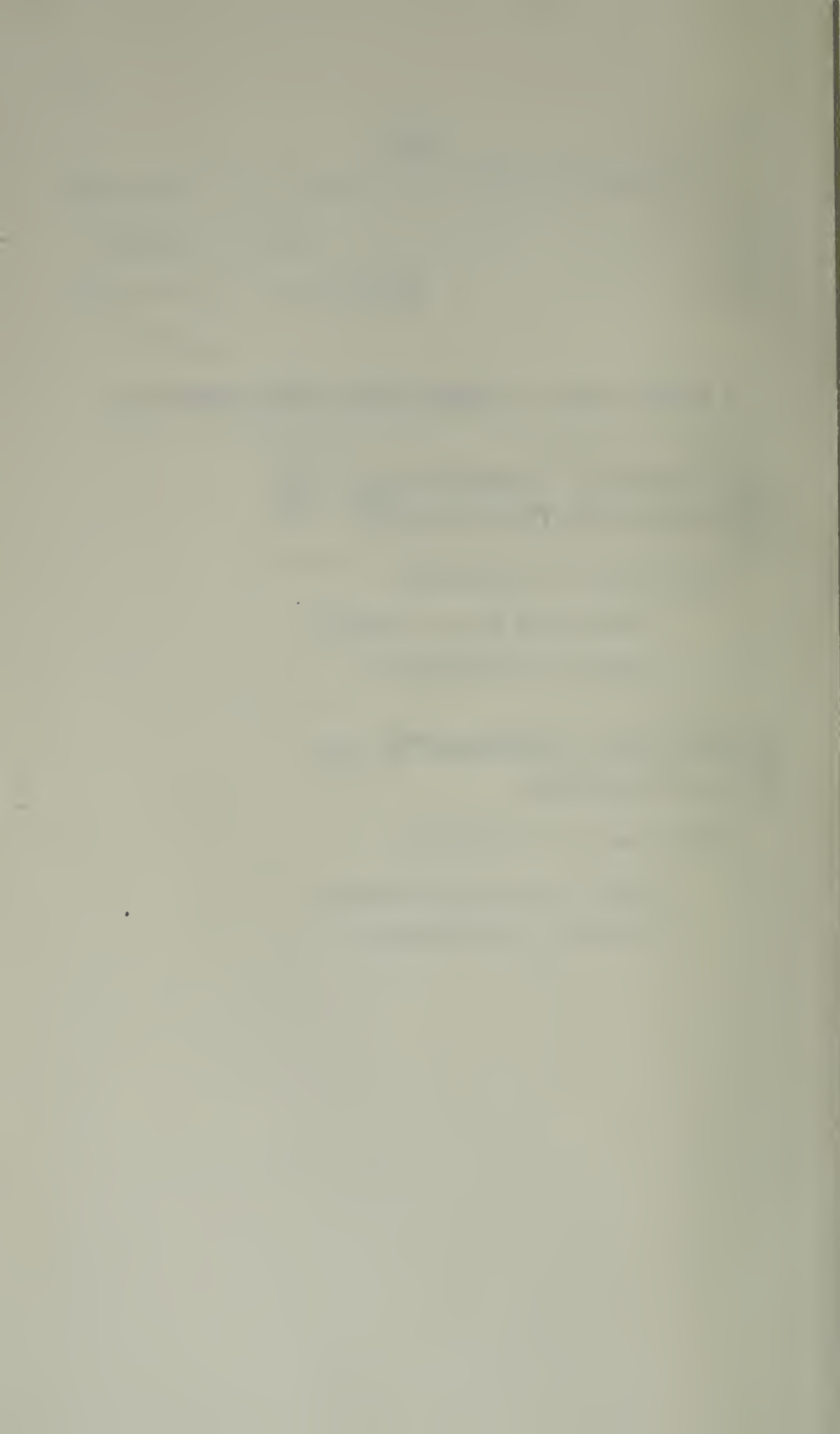
Attorneys for Appellant,

755 Dexter Horton Bldg.,
Seattle 4, Washington.

CHARLES P. MORIARTY, and
F. N. CUSHMAN,

Attorneys for Appellee,

1012 U. S. Court House,
Seattle 4, Washington.



United States District Court, Western District of
Washington, Northern Division

No. 3352

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AERIAL LUMBER COMPANY,

Defendant.

COMPLAINT

I.

In the above-entitled action the United States of America, seeks a money judgment only against the Aerial Lumber Company, formerly Oceanic Lumber & Wrecking Company, Inc., a corporation organized under the laws of the State of Washington and having its principal place of business in Seattle, in the Northern Division of the Western District of Washington.

Jurisdiction is based on Title 28, U.S.C., Section 1345.

II.

That on November 10, 1948, in response to an advertisement by the Housing and Home Finance Agency of the Public Housing Administration, the Oceanic Lumber and Wrecking Company, Inc., bid, and was granted a contract for the purchase of Item No. 5 contained in said bid for the sum of \$1,500.00.

III.

That under the terms of said contract, said de-

fendant was to pay the Public Housing Administration the said sum of \$1,500.00 and to remove the temporary houses located on Federal Public Housing Project No. 1 at Everett, Washington, within 90 days from the date of the acceptance of said bid. That a copy of said contract is hereto attached and made a part of this complaint.

IV.

That on November 5, 1948, the said defendant was awarded Building No. 10 for \$1,200.00, Building No. 20 for \$1,600.00 and Building No. 24 for \$800.00 under the same terms and conditions and under the same form of contract as heretofore referred to relative to Item No. 5.

V.

That the defendant utterly failed to remove the buildings according to the terms of the contract, or to pay the amount of the bid and in accordance with the terms of the contract, the plaintiff called for rebids and declared the contract in default.

VI.

That thereafter the General Accounting Office made an investigation of the accounts between the Oceanic Lumber and Wrecking Company, Inc., and the United States of America and determined that the sum of \$2,723.70 was due from the Oceanic Lumber and Wrecking Company, Inc., to the United States of America and issued its Certificate No. 50218 on April 3, 1950, a copy of said certificate being attached hereto and made a part of this complaint.

VII.

That on or about July 25, 1952, the Oceanic Lumber and Wrecking Company, Inc., filed an amended articles of incorporation changing its name to Aerial Lumber Company.

Wherefore, the United States of America prays for judgment in the sum of \$2,723.70 and for interest at the rate of 6% per annum from April 3, 1950, and for its costs and disbursements herein.

/s/ J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed January 27, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now the Defendant above named and in answer to Plaintiff's Complaint, admits, alleges and denies as follows:

I.

With respect to Paragraph I thereof, admits all but the first line thereof.

II.

With respect to Paragraph II thereof, admits all but the words "and was granted a contract" which defendant denies.

III.

With respect to Paragraph III thereof, admits

the execution of documents appearing as pages 5 through 9 of the Exhibit to the Complaint, and denies every other allegation or inference therefrom in said paragraph contained.

IV.

With respect to Paragraph IV thereof, admits the execution of documents appearing as pages 1 through 4 of the Exhibit to the Complaint, and denies every other allegation or inference therefrom in said paragraph contained.

V.

With respect to Paragraph V thereof, admits that plaintiff called for rebids and denies every other allegation or inference therefrom in said paragraph contained.

VI.

With respect to Paragraph VI thereof, admits the issuance of the documents appearing as pages 10 and 11 of the Exhibit to the Complaint, and denies every other allegation or inference therefrom in said paragraph contained.

VII.

Admits Paragraph VII thereof.

And for Further Answer and Affirmative Defense
Defendant Alleges:

I.

That prior to the expiration of sixty (60) days from mailing notices of acceptance as alleged in plaintiff's Complaint, Plaintiff, through its duly

authorized agents, for valuable consideration, waived any rights plaintiff might have claimed by virtue of the matters and things contained in plaintiff's Complaint in that plaintiff agreed to release defendant from them in consideration of defendant forfeiting its bid deposit of \$280.00 and permitting plaintiff to offer the property for rebid. Plaintiff is estopped by said acts of its agents to maintain this action.

Wherefor defendant prays that plaintiff's complaint be dismissed and defendant recover such costs and disbursements as the law and rules of this Court may permit.

/s/ RAYMOND D. TORBENSON,
/s/ RICHARD M. THATCHER,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 5, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been fully heard by the above-entitled Court, sitting without a jury, the parties being represented by Counsel and the Court having rendered its oral decision, now, therefore, the Court makes and enters its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That on November 10, 1948, defendant corporation or its predecessor bid and was granted a contract by plaintiff for the purchase of housing unit No. 5 under Contract No. H.A. (Wash-45073).

II.

That on November 5, 1948, said defendant was granted a contract by plaintiff for the purchase of housing units Nos. 10, 20 and 24 under Contract No. H.A. (Wash-45245).

III.

That defendant failed to pay for or remove said buildings, thereby violating the terms of the contract.

IV.

That plaintiff's Exhibit No. 6, being certificate No. 50218 from the General Accounting Office, correctly states the damage to plaintiff in the total amount of \$2,723.70, plus interest from the date of said certificate, April 3, 1950, to the date of entry of said judgment, at the rate of 6%. Defendant excepts to finding of fact IV above and his exception is allowed.

Done in Open Court this 16th day of August, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

CONCLUSIONS OF LAW

I.

That plaintiff has sustained its burden of proof and is entitled to recover of and from the defendant on account of said contract the sum of \$2,723.70, together with interest from April 3, 1950, to date of judgment, being \$710.86, and thereafter at the legal rate.

II.

That plaintiff is entitled to recover as a further item, the taxable costs and disbursements incurred herein.

III.

That defendant take nothing by its affirmative defense herein. Exceptions allowed defendant.

Done in Open Court this 16th day of August, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and Approved:

/s/ F. N. CUSHMAN,

Asst. U. S. Attorney.

Approved:

.....,

Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 16, 1954.

United States District Court, Western District of
Washington, Northern Division

No. 3352

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AERIAL LUMBER COMPANY,
Defendant.

JUDGMENT

This cause having been fully heard by the above-entitled Court, sitting without a jury, the parties being represented by counsel, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefore, it is

Ordered, Adjudged and Decreed That the plaintiff shall recover from and of the defendant the sum of \$2,723.70, together with interest from April 3, 1950, in the sum of \$710.86, and together also with its costs in the amount of \$49.60. And that defendant take nothing by its affirmative defense herein.

Done in Open Court this 16th day of August, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and Approved:

/s/ F. N. CUSHMAN,

Asst. U. S. Attorney.

Approved:

.....,

Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The United States of America, Plaintiff, and to
Charles P. Moriarty, United States Attorney,
Its Attorney:

You Are Hereby Notified that, pursuant to Rule 73, Federal Rules of Civil Procedure, the Defendant above named does hereby take an appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment, and each and every part thereof, made and entered by the Honorable John C. Bowen herein on the 16th day of August, 1954.

Dated this 14th day of September, 1954.

RAYMOND D. TORBENSON and
RICHARD M. THATCHER,
Attorneys for Aerial Lumber
Company.

[Endorsed]: Filed September 14, 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL BY
CASH DEPOSIT

The Defendant-Appellant, Aerial Lumber Company, hereby deposits with the Clerk of the above-entitled Court, the sum of Two Hundred Fifty (\$250.00) Dollars for cost bond on appeal in conformity with Rule 73 (c) of the Federal Rules of

Civil Procedure and is held and firmly bound unto the Plaintiff above named in said penal sum of \$250.00.

The condition of this obligation is such that if the above-named Aerial Lumber Company shall pay costs awarded the Plaintiff if the appeal herein is dismissed or such costs as the Court may award Plaintiff if the judgment herein is modified or affirmed, then this bond and obligation shall be void and of no effect; otherwise, it shall remain in full force and effect.

Sealed with my seal and dated this 16th day of September, 1954.

[Seal] AERIAL LUMBER COMPANY,

By /s/,
Its President.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 22, 1954.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

Disbursements

| | Amount Claimed |
|---|----------------|
| Clerk's Fees | \$15.00 |
| Marshal's Fees | 5.70 |
| Attorney's Fees | 20.00 |
| Witness Fees: | |
| Charles W. Ross, Poulsbo, Wash., 1 day, | |
| 70 miles | 8.90 |
| | <hr/> |
| Total | \$49.60 |

Taxed August, 1954.

.....,

Clerk.

Duly Verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 16, 1954.

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

No. 3352

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AERIAL LUMBER COMPANY,

Defendant.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS AT
TRIAL

August 4, 1954—10:00 A.M.

Appearances:

FRANCIS N. CUSHMAN,

Assistant United States Attorney,

Appearing for and on Behalf of Plain-
tiff.

RICHARD M. THATCHER, ESQ.,

Appearing for and on Behalf of Defend-
ant.

The Court: I would like to know if counsel in
Cause No. 3352, United States of America, Plain-
tiff, vs. Aerial Lumber Company, Defendant, are
ready to proceed with that trial?

Mr. Cushman: Yes, your Honor.

Mr. Thatcher: Yes, your Honor.

(Discussion re defendant's trial memorandum.)

The Court: Now, you may make your statement, Mr. Thatcher.

Mr. Thatcher: I have previously told Mr. Cushman that this memorandum was prepared on Monday. Since Monday, I have talked to Mr. Ross, [2*] who is here in the courtroom, an employee of the Seattle Public Housing Authority and who has information with respect to these items, and Mr. Baker and I have determined in my own mind that I will not be able to carry the burden of proof in connection with the affirmative defense and will offer no testimony upon it. It may be considered as waived and withdrawn, and that might perhaps save your Honor——

The Court: Very well.

(Further discussion re defendant's trial memorandum.)

The Court: Now, I wish to proceed as soon as we can with this trial so as to save all the time we can. Was there something else you wished to say that should be said now?

Mr. Cushman: Well, your Honor, I would like to say that Mr. Thatcher and I are agreed about all the facts. I will be presenting various documents, and the pleadings have admitted the great majority of them.

The Court: We are now referring to Cause No. 3352, United States of America, Plaintiff, vs. Aerial

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Lumber Company, Defendant, and we have been speaking of that at all times. Now, [3] at this time, counsel having announced that they are ready to proceed with the trial, the Court will hear the opening statement of the plaintiff, if he wishes to make an opening statement. If he does not wish to do so, the Court will hear counsel in respect to any other phase of the case, or if counsel feels that something else before the opening statement should be said regarding the pleadings and issues, counsel may now make such statement. However, I wish you would finally indicate your attitude concerning the making or not making of plaintiff's opening statement.

Mr. Cushman: Well, your Honor, I would like to make a very brief statement.

The Court: Very well. Now, I wish you to make a statement as to the state of the pleadings or issues at this time before you do that.

Mr. Cushman: Your Honor, the documents in this case are somewhat complicated. However, all documents that will be admitted in the first stage are admitted by the pleadings. The execution and delivery of those documents is acknowledged by the pleadings and, basically, we have a straight contract case. [4]

The defendant, Oceanic Lumber, which is now Aerial Lumber, presented an offer to the Public Housing Administration, an offer for the purchase of certain buildings. Now, the buildings in question are in two groups. There are three buildings in a project here in Seattle. These were surplus build-

ings which were sold by the Public Housing Agency. One building was in an Everett housing project. The documents which I will present are split into those two groups, three buildings in one and one building in the other.

The Oceanic or Aerial Lumber Company presented an offer. Along with the offer was a deposit securing the offer. The offer was accepted by the Public Housing Administration. Now, that is all one form, the Offer and Acceptance of Offer. This form refers, in turn, to one Invitation to Bid, which in each case is identical in its substantive information. The only difference between the two groups of buildings is the difference in designation of the buildings, and in each case there are also general conditions which are made a part of the agreement by reference. [5]

The contract was awarded, and Oceanic—or Aerial—failed to live up to the terms of the contract. After notice of their default, the buildings were readvertised and a subsequent sale was held.

The amount of the damage in this case is the amount of the original bid on all four buildings less the deposit which was forfeited to the Government, less the price received on resale.

The Court: Received by whom on resale?

Mr. Cushman: Received by the Public Housing Authority on the resale of these four buildings, and in addition is added as an item of expense the cost of readvertising the buildings. Now, that is the total amount requested. It is set forth in a certificate of settlement which also was served on defend-

ant along with the pleadings. At this time I believe—now, counsel, will you check me—I believe that defendant's counsel will admit the figures in the certificate of settlement from the General Accounting Office. He will not challenge those, but he challenges the legal effect of the certificate of settlement.

The Court: As I understand, your statement means that if the defendant is liable, the [6] defendant has no quarrel with the accuracy of the figures or statement made in the certificate of settlement.

Mr. Cushman: I believe that is right.

The Court: Is that right?

Mr. Thatcher: That is correct.

The Court: Now, we will hear at this time or later in the conduct of the trial the defendant's opening statement.

Mr. Thatcher: If the Court please, there are two elements to the defense of the defendant in this case. One involves paragraph 2 of the General Conditions which Mr. Cushman said, and I believe it is a correct statement, were incorporated in the Offer and Acceptance of Offer by appropriate language in the document signed by the person on behalf of the defendant.

In paragraph 2, there is the statement:

“The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security.”

The documents which I understand the [7] Gov-

ernment intends to offer in evidence here will be resisted as to their legal effect as a determination by the contracting officer under that paragraph. I believe the evidence will show that there was no communication of any determination to the defendant and that the documents themselves do not purport on their face to be such a determination pursuant to the terms of the contract.

It is the further position of the defendant that the determination or the information contained in those documents is erroneous as a matter of law.

In the same paragraph, paragraph 2, there is this language:

“The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition.”

There is another paragraph of the General Conditions that bears upon this matter, being paragraph 6, which again refers to what should happen in the event the purchaser fails to complete the [8] removal and clean-up, and it talks about the Government charging the purchaser with the cost of removing the dwellings and cleaning up the site.

Now, all of the evidence in this case offered by the Government to which objection will be made goes to an element which I would describe—and I think is properly described—as loss of profit. That is the difference between our bid and the amount received on rebid, which it is our position is not an expense under the very terms of the contract, the

parties having described in their contract the items of damage that they were talking about, and if the Court follows the contract, it may award the Government any expense but not loss of profits.

Now, the Government received the bid security in the amount of, I believe, around \$350.00. Their costs on resale were around \$50.00. There is no cross-complaint, and insofar as the defendant is concerned, the Government has no loss occasioned by expense.

The Court: You may call the first witness for the plaintiff or otherwise proceed with the plaintiff's case in chief. [9]

Mr. Cushman: I wish to submit as exhibits, the documents attached to the complaint.

The Court: Do you have copies of them?

Mr. Cushman: Yes, I do, and I thought it might be helpful to the Court——

The Court: You ought to have something in the files to keep from changing the state of the files. Will the offer of copies accomplish that?

Mr. Cushman: Well, your Honor, these are the copies of the documents attached to the complaint.

The Court: I will let you have the Court's file in case it is needed. Let opposing counsel compare the two and see if he is agreeable to the use of copies or whether he insists that the originals be used as exhibits instead of copies. If he does insist upon it, the Clerk will withdraw from the files the original exhibits for the purpose of having them marked and identified.

(The Court's file is handed to Mr. Cushman who confers with Mr. Thatcher.)

Mr. Cushman: Your Honor, may I have this exhibit marked Plaintiff's Exhibit 1?

The Clerk: Plaintiff's Exhibit No. 1. [10]

(Contractual documents re Seattle sale marked Plaintiff's Exhibit No. 1 for identification.)

The Court: And what do you say is the kind of thing Plaintiff's Exhibit 1 is? Try to make a statement which you believe will be acceptable to opposing counsel.

Mr. Cushman: Plaintiff's Exhibit 1, your Honor, begins with a statement and certificate of award, which is merely a form of the Public Housing Authority which acknowledges that an award has been made. Page 2 of Exhibit 1 is the actual offer signed by the defendant and countersigned——

The Court: What I am trying to do is to get you to assign to this exhibit a name which in the future would clearly distinguish it, if somebody called it by that name, from each and every other exhibit in the case. Can you give it such a name?

Mr. Cushman: Your Honor, Plaintiff's Exhibit 1 could be called the contractual documents in connection with the Seattle sale.

The Court: Then I guess they are the contractual documents?

Mr. Cushman: Yes, your Honor. [11]

The Court: Is there any objection to such a statement in connection with them?

Mr. Thatcher: No, your Honor; no objection to their admittance.

The Court: They purport to be photostatic

copies, Plaintiff's Exhibit 1. Do you wish to offer it now?

Mr. Cushman: May it be offered?

The Court: It is now admitted.

(Plaintiff's Exhibit No. 1 received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

(Admitted August 4, 1954)

Statement and Certificate
of Award

Standard Form No. 1036—Revised

Contract No. (Wash-45245)

Date Nov. 5, 1948.

(Department or establishment): Housing & Home
Finance Agency.

(Bureau or office): Public Housing Administration.

(Location): San Francisco 2, Calif.

Method of or Absence of Advertising

(Section 3709 of the Revised Statutes)

1. After advertising in newspapers.
2. (a) After advertising by circular letters sent
to dealers.
- (b) And by notices posted in public places.

(If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate below must be "2(a)(b)" or "2(a)," depending on whether or not notices were posted.)

Plaintiff's Exhibit No. 1—(Continued)

3. Without advertising under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.

4. Without advertising in accordance with

5. Without advertising, it being impracticable to secure competition because of

.....

(Here state circumstances under which the securing of competition was impracticable.)

Award of Contract

A. To lowest bidder as to price (Expenditures).

B. To other than the lowest bidder as to price (Expenditures).

C. To highest bidder as to price (Receipts).

D. To other than the highest bidder as to price (Receipts).

Certificate

I Certify that the foregoing statement is true and correct; that the agreement was made in consequence of No. 1 of the method of or absence of advertising and in accordance with award of contract lettered C, as shown above; that the total number of bids received is (see below), and that where lower bids (expenditure contracts) or higher bids (receipt contracts) as to price were received a statement of reasons for their rejection, together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate

Plaintiff's Exhibit No. 1—(Continued)

sheet attached hereto; that the articles or services covered by the agreement (expenditure) are necessary for the public service, and that the prices charged are just and reasonable.

WASH-45245, Building No. 10

Awarded to:

Oceanic Lumber & Wrecking Co. . \$1,200.00

Other bidders:

Matheny & Bacon 431.75

Thomas M. Tokareff 423.00

Cook and Abel 267.00

WASH-45245, Building No. 20

Awarded to:

Oceanic Lumber & Wrecking Co. . \$1,600.00

Other bidders:

Matheny & Bacon 491.50

Cook and Abel 267.00

WASH-45245, Building No. 24

Awarded to:

Oceanic Lumber & Wrecking Co. . \$ 800.00

Other bidders:

Thomas M. Tokareff 278.00

Matheny & Bacon 245.75

Cook and Abel 201.00

Eugene M. Odermat 150.00

(Signature of Contracting Officer):

/s/ M. C. REDMAN,

Director, Area A.

Plaintiff's Exhibit No. 1—(Continued)

Note.—This statement and certificate will be used to support all agreements, both formal contracts and less formal agreements of whatever character, involving the expenditure or receipt of public funds. It must be executed and signed by the contracting officer (unless the award is made by or is subject to approval by an officer other than the contracting officer, when execution and signature may be made by such officer).

Housing and Home Finance Agency
Public Housing Administration

Offer and Acceptance of Offer

Date: October 20, 1948.

Project No. WASH-45245

Seattle, Washington

To: Director, Area A

Public Housing Administration

760 Market Street

San Francisco 2, California

1. The undersigned, hereinafter referred to as the "Purchaser" has been furnished by the United States of America, acting through the Public Housing Administration, a constituent of the Housing and Home Finance Agency, hereinafter referred to as the "Seller," with a copy of the General Conditions, and the Invitation to Bid, setting forth the conditions under which the property will be sold.

Plaintiff's Exhibit No. 1—(Continued)

2. The Purchaser offers and agrees to purchase from the Seller the property set forth and described in the Invitation to Bid attached to the General Conditions, such offer being governed by and subject to the General Conditions covering the sale of such property, at the following purchase price:

| | | | |
|------------------|----|-------|------------|
| Building Number: | 10 | | \$1,200.00 |
| | 20 | | 1,600.00 |
| | 24 | | 800.00 |

3. The Purchaser transmits herewith a certified or cashier's check or money order in the amount of Two Hundred Eighty Dollars (\$280.00) payable to the Housing Authority of the City of Seattle to be held and applied as set forth in the Invitation to Bid.

4. This offer shall be binding upon the purchaser, his (its) successors and assigns in the manner and for the period, and may be accepted by the Seller, all as set forth in the General Conditions and the Invitation to Bid.

5. The Government reserves the right as its in-

Plaintiff's Exhibit No. 1—(Continued)

terests may require, to reject all bids and to waive informalities in bidding.

OCEANIC LUMBER &
WRECKING CO.,

/s/ E. A. CARLSON,

Purchaser.

10701 E. Marginal Way,
Seattle 88, Washington.

Witness:

.....

.....

Accepted by the Government subject to the General Conditions, November 5, 1948.

PUBLIC HOUSING
ADMINISTRATION,

By /s/ M. C. REDMAN,

Director, Area "A."

Housing and Home Finance Agency
Public Housing Administration
Housing Authority of the City of Seattle

Invitation to Bid

Project No. WASH-45245
Seattle, Washington

1. By notice first published on October 8, 1948, the United States of America, acting through the Public Housing Administration of the Housing and

Plaintiff's Exhibit No. 1—(Continued)

Home Finance Agency and the Housing Authority of the City of Seattle, has offered to sell the property hereinafter described, located at Seattle, Washington.

Temporary—Row Houses.

| Item | Building | Description |
|-----------------|----------|---------------------|
| Building No. 10 | 6 Units | 3 Bedrooms Per Unit |
| Building No. 18 | 6 Units | 2 Bedrooms Per Unit |
| Building No. 19 | 4 Units | 2 Bedrooms Per Unit |
| Building No. 20 | 8 Units | 2 Bedrooms Per Unit |
| Building No. 24 | 4 Units | 2 Bedrooms Per Unit |

Cabinet shower, lavatory, kitchen range, space heater, and icebox are to be sold with each unit.

2. The above-described property is offered subject to following priorities:

1. Federal agencies.
2. State and local governments.
3. Non-profit institutions.

Priority holders must meet the price established for property; otherwise their offers will be considered in competition with sealed bids from non-priority holders. In case of tie bids, preference will be given in order of priority and to veterans. Veteran preference is limited to purchase of one building.

3. Offers from priority holders and sealed bids from non-priority holders will be accepted until 2:00 p.m. Friday, October 22, 1948, at the office of the Housing Authority of the City of Seattle, 825 Yesler Way, Seattle 4, Washington, and then pub-

Plaintiff's Exhibit No. 1—(Continued)

licly opened. Bids in duplicate shall be enclosed in two envelopes (outer and inner), both of which shall be sealed and clearly labeled "Bid for Purchase and Removal" so as to guard against opening prior to the time set therefor.

4. Purchaser will provide the Housing Authority of the City of Seattle with a Performance Bond in the amount of \$50.00 per dwelling unit as required under Paragraph 2 of the General Conditions.

5. All offers except those from federal, state or local government bodies shall be accompanied by a deposit securing the offer. Said deposit shall be in the form of a certified or cashier's check or money order payable to the Housing Authority of the City of Seattle and shall be in the amount of five (5) per cent of the bid up to \$10,000 plus two (2) per cent of any amount in excess of \$10,000. The amount of the deposits made by successful bidders in accordance with this Paragraph shall be applied against the purchase price. When an offer is accepted, the unsuccessful bidders will be so notified and the checks or money orders of all unsuccessful bidders shall be immediately returned to them. Checks or money orders may be held by the Public Housing Administration without deposit and at the bidder's risk until the successful bidders are selected.

Plaintiff's Exhibit No. 1—(Continued)
Housing and Home Finance Agency
Public Housing Administration
Housing Authority of the City of Seattle

General Conditions

1. The Property available for sale is described in the Invitation to Bid annexed hereto and made a part hereof.

2. Performance Security. The Purchaser shall within 5 days of the delivery to the Purchaser of an executed copy of the contract supply (in addition to payment in full of the contract price) performance security in the form of a certified check, cashier's check or United States Post Office Money Order payable to the Housing Authority of the City of Seattle in the amount required under Section 4 of the Invitation to Bid, or shall supply a performance bond in a like amount. The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security.

3. Scope. (a) The Purchaser shall furnish all labor and material, perform all work, and assume all expenses necessary to accomplish the following:

Plaintiff's Exhibit No. 1—(Continued)

(1) Demount and remove buildings with wood floors down to ground level, including wood, brick or concrete block foundation posts or piers (but not including poured concrete posts or foundations);

(2) Take down, preserve, and replace as directed, telephone, telegraph, or other wires or fences and their appurtenant poles or posts or other interferences which may obstruct the removal of the buildings; excepting those serving buildings not included in this contract;

(3) Have all services, such as water, gas, steam, electricity and telephones, disconnected at the service mains in accordance with the rules and regulations of the owners of the utility involved or the local municipality. Securely cap and seal all storm and sanitary sewers leading from structures to be demolished. Preserve all active utilities traversing the project site;

(4) Remove all salvage (except as specified herein) and debris resulting from the operation and all tools and apparatus from the site, restore the site of the buildings, as far as possible, to its condition immediately prior to the removal of the buildings by filling solidly any holes or trenches resulting from the operation and leave the site clean and free from hazards, all to the satisfaction and approval of the Contracting Officer.

Plaintiff's Exhibit No. 1—(Continued)

(b) In the performance of the foregoing work the Purchaser shall at all times provide adequate protection to persons and property, and to prevent spread of dust and flying particles; provide water and necessary connections therefor; and shall avoid interfering with the use of the adjacent buildings or interruption of free passage to or from the same.

(c) The Purchaser shall use no dynamite nor powder and do no blasting on the site and shall not burn materials or debris on the site without the specific permission of the Contracting Officer.

(d) Dwelling structures shall not be removed in an intact or substantially intact or substantially intact position but shall be disassembled to such an extent that the structural parts thereof are reduced to at least flat panels.

“Title to any dwelling structures which are removed from the site without reducing same to at least flat panels is reserved in the United States of America and possession of such structures may be recovered by the government upon 10 days notice to the purchaser or his successors in interest. Such notice may be given within a reasonable time after discovery of the breach by the government.”

4. Licenses and Permits. The Purchaser shall obtain and pay for all required permits, licenses and fees necessary in connection with its work, without cost or expense to the government.

The Court: Now you can make any reference to it desired by you. It is in evidence. If you want to read part of it, or call attention to all of it, whatever it is you wish to do, you may do.

Mr. Cushman: Well, your Honor, I just wish to point out that the second document in Plaintiff's Exhibit 1 is the offer of the defendant in this case, Oceanic Lumber & Wrecking Co., which is signed by Mr. Baker, their President, an offer to purchase Building Nos. 10, 20 and 24.

The Court: That is the offer to [12] purchase buildings is the second paper in Exhibit 1, is that right?

Mr. Cushman: Yes, your Honor.

The Court: You may proceed.

Mr. Cushman: Offer to purchase Buildings 10, 20 and 24 for a price which is designated in the offer across from the building numbers from the Public Housing Administration.

Paragraph 3 of that offer provides that:

“The Purchaser transmits herewith a certified or cashier's check or money order in the amount of Two Hundred Eighty Dollars (\$280.00) payable to the Housing Authority of the City of Seattle to be held and applied as set forth in the Invitation to Bid.”

Paragraph 4 provides this offer shall be—provides generally that this offer shall be binding upon the purchaser as provided in the General Conditions and Invitation to Bid.

Referring then to page 3 of Plaintiff's Exhibit

The Court: I do not see any page 3.

Mr. Cushman: It is the third paper.

The Court: All right. You may proceed.

It is entitled at the top of the page "Housing and [13] Home Finance Agency, Public Housing Administration, Housing Authority of the City of Seattle, Invitation to Bid," is that what it is called?

Mr. Cushman: Yes, your Honor.

Paragraph 5 of that Invitation to Bid provides in general terms for the deposit which is mentioned in the Offer, the deposit of \$280.00 which I mentioned previously, your Honor.

The Court: We are taking up too much time and are not getting very far. We will have to expedite the matter.

Mr. Cushman: Then, in addition, pages 4 and 5 are the General Conditions, which conditions will be discussed in the argument as to their effect on this contract.

I also wish to call your Honor's attention on page 2 of Plaintiff's Exhibit 1 to the signature of M. C. Redman, Director, Area "A," who signed on behalf of the Public Housing Administration accepting the offer.

The Court: Are there any other exhibits as to which you think counsel on both sides have the same attitude?

Mr. Cushman: Your Honor, may I have this exhibit marked Plaintiff's Exhibit No. 2? [14]

The Clerk: Plaintiff's Exhibit No. 2.

(Contractual documents re Everett sale marked Plaintiff's Exhibit 2 for identification.)

Mr. Cushman: Plaintiff's Exhibit No. 2 are copies of the contractual instruments which relate to the sale of one housing unit in Everett in the County of Snohomish. The documents concerned, except for the details as to the number of the house and the price are exactly identical—and dates, your Honor—are identical in general terms with the documents in Plaintiff's Exhibit 1.

The Court: What do the other contractual documents in Plaintiff's Exhibit 1 relate to?

Mr. Cushman: They relate to the sale of three housing units in Seattle, in King County.

The Court: And this relates to the sale of one housing unit or more in Everett?

Mr. Cushman: One housing unit in Everett.

The Court: You may proceed with something else. Do you want to take any steps to get it in evidence or do anything like that?

Mr. Cushman: May I offer Plaintiff's Exhibit No. 2 in evidence? [15]

The Court: Any objection?

Mr. Thatcher: No objection, your Honor.

The Court: Admitted.

(Plaintiff's Exhibit No. 2 received in evidence.)

PLAINTIFF'S EXHIBIT No. 2

(Admitted August 4, 1954)

Statement and Certificate
of Award

Standard Form No. 1036—Revised.

Contract No. HA(WASH-45073) dph-2

Date: November 10, 1948.

(Department or establishment): Housing and Home
Finance Agency, Public Housing Administration.

(Bureau or office): Region I—Area A.

(Location): San Francisco, California.

Method of or Absence of Advertising
(Section 3709 of the Revised Statutes)

1. After advertising in newspapers.
2. (a) After advertising by circular letters sent to 15 dealers.
- (b) And by notices posted in public places.

(If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate below must be "2(a)

Plaintiff's Exhibit No. 2—(Continued)

(b)" or "2(a)," depending on whether or not notices were posted.)

3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.

4. Without advertising in accordance with

5. Without advertising, it being impracticable to

Plaintiff's Exhibit No. 2—(Continued)

secure competition because of

(Here state circumstances under which the securing of competition was impracticable.)

Award of Contract

- A. To lowest bidder as to price (Expenditures).
- B. To other than the lowest bidder as to price (Expenditures).
- C. To highest bidder as to price (Receipts).
- D. To other than the highest bidder as to price (Receipts).

Certificate

I Certify that the foregoing statement is true and correct; that the agreement was made in consequence of Nos. 1, 2(a) (b) of the method of or absence of advertising and in accordance with award of contract lettered C, as shown above; that the total number of bids received is 4, and that where lower bids (expenditure contracts) or higher bids (receipt contracts) as to price were received a statement of reasons for their rejection, together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate sheet attached hereto; that the articles or services covered by the agreement (expenditure) are necessary for

Plaintiff's Exhibit No. 2—(Continued)

the public service, and that the prices charged are just and reasonable.

Building No. 5

| | |
|------------------------------------|-----------|
| Dickey & Clausen | \$ 404.00 |
| I. A. Welch | 930.60 |
| Cook & Abel | 617.00 |
| Oceanic Lumber & Wrecking Co. | 1,500.00 |

/s/ M. C. REDMAN,

Director, Area A, Region I.

Note.—This statement and certificate will be used to support all agreements, both formal contracts and less formal agreements of whatever character, involving the expenditure or receipt of public funds. It must be executed and signed by the contracting officer (unless the award is made by or is subject to approval by an officer other than the contracting officer, when execution and signature may be made by such officer).

Plaintiff's Exhibit No. 2—(Continued)

PHA

RI-Area-23

2-19-48

Housing and Home Finance Agency
Public Housing Administration

Offer and Acceptance of Offer
Disposal Unit No. 1

Date: October 20, 1948.

Project No.: Wash 45073

Location: Everett, Wash.

To: Housing and Home Finance Agency
Public Housing Administration—Area A
760 Market Street
San Francisco, California

1. The undersigned, hereinafter referred to as the "Purchaser" has been furnished by the United States of America, acting through the Public Housing Administration, a constituent of the Housing and Home Finance Agency, hereinafter referred to as the "Seller," with a copy of the General Conditions, and the Invitation to Bid, setting forth the conditions under which the property will be sold.

2. The Purchaser offers and agrees to purchase from the Seller the property set forth and described in the Invitation to Bid attached to the General Conditions, such offer being governed by and subject to the General Conditions covering the sale of such property, at the following purchase price \$250.00 per unit Dollars (\$1,500.00).

Plaintiff's Exhibit No. 2—(Continued)

Building Number:

Preferable No. 5—or 3 or 4 or 6 or 7.

3. The Purchaser transmits herewith a certified or cashier's check or money order in the amount of Seventy-five Dollars (\$75.00) payable to the Treasurer of the United States to be held and applied as set forth in the Invitation to Bid.

4. This offer shall be binding upon the Purchaser, his (its) successors and assigns in the manner for the period, and may be accepted by the Seller, all as set forth in the General Conditions and Invitation to Bid.

5. The Government reserves the right as its interest may require, to reject all bids and to waive informalities in bidding.

OCEANIC LUMBER &
WRECKING CO., INC.,

Purchaser;

/s/ WM. A. BAKER,

President.

10701 E. Marginal Way,
Seattle 88, Washington.

Witness:

.....

.....

Accepted by the Government subject to General
Conditions for Building No. 5, November 10, 1948.

PUBLIC HOUSING
ADMINISTRATION,

By /s/ M. C. REDMAN,

Director, Area A, Region I.

Plaintiff's Exhibit No. 2—(Continued)

PHA

RI-Area-22

2-19-48

Housing and Home Finance Agency
Public Housing Administration

Invitation to Bid

Project No.: Wash-45073

Location: Everett, Washington

1. By notice first published on October 6, 1948, the United States of America, acting through the Public Housing Administration of the Housing and Home Finance Agency, has offered to sell the property hereinafter described; located at Everett, Washington.

Temporary—Row Houses.

| Item | Building | 1-Bedroom Unit | 2-Bedroom Unit | 3-Bedroom |
|------|----------|-------------------|-------------------|-----------|
| 1 | 1 | | 4 | |
| 2 | 2 | | 4 | |
| 3 | 3 | 4 | | 2 |
| 4 | 4 | 4 | | 2 |
| 5 | 5 | 4 | | 2 |
| 6 | 6 | 4 | | 2 |
| 7 | 7 | 4 | | 2 |
| 8 | 8 | | 4 | |
| 9 | 9 | | 4 | |
| 10 | 10 | | 4 | |

2. The above-described property is offered subject to following priorities:

1. Federal Agencies.
2. State and Local Governments.
3. Non-Profit Institutions.

Plaintiff's Exhibit No. 2—(Continued)

Priority holders must meet the price established for property; otherwise their offers will be considered in competition with sealed bids from non-priority holders. In case of tie bids, preference will be given in order of priority. Veteran preference is limited to only one unit of purchase.

3. Offers from priority holders and sealed bids from non-priority holders must be submitted within 15 days from date of first advertisement as above set forth, and prior to the time for the opening of bids as set forth in the advertisement. Established price to priority holders and other information pertaining to this offering may be secured from Mr. Frank Spencer, Executive Director, Housing Authority of the City of Everett, Washington. Bids will be enclosed in separate sealed envelope addressed to the above and marked "Bid for Purchase and Removal."

4. Purchaser will provide the Public Housing Administration with a Performance Bond in the amount of \$500.00 per building as required under paragraph 2 of the General Conditions.

5. All offers except those from federal, state or local government bodies shall be accompanied by a deposit securing the offer. Said deposit shall be in the form of a certified or cashier's check or money order payable to the Treasurer of the United States and shall be in the amount of five (5) per cent of the bid up to \$10,000 and two (2) per cent of any amount in excess of \$10,000. The amount of the deposits made by successful bidders in ac-

Plaintiff's Exhibit No. 2—(Continued)

cordance with this paragraph shall be applied against the purchase price. When an offer is accepted, the unsuccessful bidders will be so notified and the checks or money orders of all unsuccessful bidders shall be immediately returned to them. Checks or money orders may be held by the Public Housing Administration without deposit and at the bidder's risk until the successful bidders are selected.

[The General Conditions omitted from Plaintiff's Exhibit No. 2 are identical to General Conditions set forth in Plaintiff's Exhibit No. 1.]

Mr. Cushman: I would like to call Mr. Ross to the stand.

CHARLES W. ROSS

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cushman:

Q. Would you state your name and address?

A. My name is Charles W. Ross.

Q. And your address, please?

A. Office address or home?

Q. Office.

A. Office address is 825 Yesler Way.

Q. What is your position?

(Testimony of Charles W. Ross.)

A. I am the Executive Director of the [16] Housing Authority of the City of Seattle.

Q. Are you familiar with the sale of certain housing project units owned by the Public Housing to the Oceanic Lumber & Wrecking Company, now Aerial Lumber Company, which occurred in approximately October of 1948? A. I am.

Mr. Cushman: Will you mark that Plaintiff's Exhibit 3, please?

The Clerk: Plaintiff's Exhibit 3.

Mr. Cushman: Your Honor, may I have permission to substitute for that exhibit a certified copy of it?

The Court: Mr. Clerk, will you take Plaintiff's Exhibit 3; remove the Clerk's marks from it; and then substitute the other one offered by counsel as Plaintiff's Exhibit 3 and put the Clerk's marks on that?

(Certified copy of letter dated April 8, 1949, marked Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Cushman): Mr. Ross, you have been handed Plaintiff's Exhibit 3 for identification. Do you know what that document is? [17]

A. Yes. It is a copy of a letter that I wrote to Mr. M. C. Redman, who at that time was the Director of the Seattle Field Office of the Public Housing Administration.

Q. In very general terms, what did you set forth in the letter?

The Court: Now, wait just a moment. What

(Testimony of Charles W. Ross.)

subject, if any, was discussed in the letter? Was there a subject discussed in the letter?

The Witness: Yes. It was the loss the Government had suffered by reason of the default of the Oceanic Lumber Company.

Mr. Thatcher: I object——

The Court: Just a minute. You cannot state the contents of the letter. Just state the subject under discussion in the letter. Losses under the contract, is that what was discussed in the letter?

The Witness: Yes. The contents of the letter——

The Court: No. That is enough. Ask him another question.

Q. (By Mr. Cushman): What transaction was involved? What does the letter concern?

A. It concerns the original bids received on [18] certain buildings in the Taylor Avenue Homes project and the bids received on the reoffering of those buildings, and the difference between them.

Q. And what bidder is the letter concerned with?

A. It is concerned primarily with the Oceanic Lumber & Wrecking Company.

Mr. Cushman: I move the admission of that letter, Plaintiff's Exhibit 3.

Mr. Thatcher: May I make one inquiry of the witness?

The Court: You may on voir dire.

Mr. Thatcher: Yes, sir.

(Testimony of Charles W. Ross.)

Voir Dire Examination

By Mr. Thatcher:

Q. Mr. Ross, were you the contracting officer on April 8, 1949?

A. I was a representative of the contracting officer.

Mr. Thatcher: If the Court please, I believe that Exhibit 3 will be immaterial and irrelevant to the inquiry before the Court at this time. Now, the information contained in [19] the letter as to figures and amounts is available through another exhibit which I have already indicated to your Honor that I will read to you, that is——

The Court: Well, do you make the point that the one you are going to offer serves better the purpose which you believe plaintiff has in mind or what causes you to make the statement?

Mr. Thatcher: This letter contains conclusions of Mr. Ross with respect to the legal significance of the events regarding the Seattle units, the three Seattle units. It contains certain other information, but the letter is not a determination by a contracting officer and is, therefore, Mr. Ross' hearsay statement to Mr. Redman as to his conclusions with respect to the actions of the defendant and the Government in this case.

The Court: I will hear further testimony. If its admissibility is objected to, you will have to establish admissibility.

I understand this letter was not addressed to

(Testimony of Charles W. Ross.)

any one representing the defendant but it was addressed to some public official representing the same plaintiff which is now the party in [20] this action.

Mr. Cushman: That is right, your Honor.

The Court: That both the addressor and addressee of this communication were at the time in the employ of the plaintiff.

Mr. Cushman: That is right, your Honor.

The Court: Proceed.

Direct Examination
(Continued)

By Mr. Cushman:

Q. Mr. Ross, what was the first contact you had with the situation we are discussing, with the purchase by Aerial Lumber of certain buildings in your area?

A. The first contact I recall was in the actual opening of the bids received at the time set for it, which I don't at the moment recall.

Q. State, if you know, who the successful bidder was.

A. The successful bidder on these three buildings was the Oceanic Lumber & Wrecking Company.

Q. When did you next have any contact with the Oceanic contract?

A. The evidence in the files indicates that I had contact with them, of which there is no specific [21] record in our files, some time within a week or so after the bids were opened.

Q. And what information did you get from them

(Testimony of Charles W. Ross.)

and what action did you take?

A. I can answer the first question better. The information I got from them was an indication that they were not going to fulfill their contract by paying the balance and removing the buildings.

Mr. Thatcher: I beg your pardon, Mr. Ross.

The Court: Read the answer, all of it.

(The last answer is read by the reporter.)

Q. (By Mr. Cushman): Where did you get that information, physically?

A. To the best of my recollection, it was at a meeting in my office at 825 Yesler Way.

The Court: Well, now, that suggests the further disclosure as to who was present, etc. I still do not know whether it is hearsay. Do you not see that?

Mr. Cushman: Yes, your Honor.

Q. (By Mr. Cushman): State, if you know, who was present in your office at the time of the conversation you just referred to.

A. I cannot recall. [22]

The Court: State, if you know, whether anybody representing the defendant was present.

The Witness: Yes.

The Court: Who was it, if you know?

The Witness: I couldn't say with absolute certainty, but I can assume from subsequent events that it was Mr. Baker.

The Court: Now you can say what was said, if counsel wishes you to do so. You can say what

(Testimony of Charles W. Ross.)

was said then and there by Mr. Baker and by you or by any other person. Was there any other person present besides you and Mr. Baker?

The Witness: I do not recall.

The Court: Then if counsel wishes to do it, on proper question you may inquire as to what was said or done.

Mr. Cushman: I believe he answered he did not know, your Honor.

The Court: I do not think so. You either misunderstood him or the Court did. He said he did not recall who else, if any one, was present. That is the effect of my understanding of his statement.

Q. (By Mr. Cushman): What was said at the time of this conversation? [23]

The Court: That means what did you say and what did Mr. Baker say. Will you please try to say what each one said?

A. That, at this late date, I cannot do. I can't remember.

Q. Well, what do you remember, in general terms, of the effect of the conversation?

A. In general terms, it was an indication that——

The Court: By whom?

The Witness: By Mr. Baker.

A. (Continued): that the Oceanic Lumber & Wrecking Company was not going to go through with their offer, completion of their offer, by completing the payment and removing the buildings, and to the best of my recollection, questions were

(Testimony of Charles W. Ross.)

asked me of what the effect of their failure to go through would be.

Q. And did you answer that?

The Court: By whom? Was asked you by whom, if you know?

The Witness: By Mr. Baker; by a representative of the Oceanic Lumber & Wrecking Company whom I believe was Mr. Baker.

Q. (By Mr. Cushman): And did you answer that question at that [24] time?

A. I answered that question that there was no question but that the bid deposit would be lost to the Oceanic Lumber & Wrecking Company and, further, that they would be liable for any difference between what the Government received on a subsequent sale or sale to the second bidder.

Q. Did you follow through on this conversation in any way? A. Yes.

Q. How?

A. By reporting these facts to the Public Housing Administration office in San Francisco.

The Court: Did you have any obligation to do that so far as your employment and carrying out your duties of employment were concerned?

The Witness: Yes.

The Court: You may inquire.

Q. (By Mr. Cushman): Did you have any contacts in writing with the defendant after that conversation last mentioned?

A. Yes. After the contract was accepted by the Government, they were forwarded to me for sub-

(Testimony of Charles W. Ross.)

mittal to the Oceanic Lumber & Wrecking Company with the request that they fulfill the conditions of the contract by the [25] payment, and the completion of the payment, and providing a performance bond. Upon receiving those instructions, I took, personally, to the office of the company a copy——

The Court: The defendant?

The Witness: Oceanic Lumber & Wrecking Company.

A. (Continued): their copy of the accepted contract and a letter of transmittal which I asked for and received acknowledgment of the receipt of that contract.

The Court: Do you wish to show him anything in connection with this last statement?

Mr. Cushman: (No answer.)

The Court: Then you may proceed, Mr. Cushman. Let us get this under way.

Q. (By Mr. Cushman): Did you have occasion to correspond with the defendant after that day?

A. No.

The Court: Are you going to ask this witness anything about Plaintiff's Exhibit 3? That was the thing that was before the Court when we started to examine this witness with respect to the last subject matter. Can you manage in some way to bring home to this witness whatever it is you intended to? [26]

Q. (By Mr. Cushman): Referring you now to Plaintiff's Exhibit 3, do you know who prepared that?

A. Yes. I did.

(Testimony of Charles W. Ross.)

Q. And did you prepare it from your own knowledge?

A. My own knowledge and reference to the data pertaining to the matter we have on file.

Q. And what does that letter show?

The Court: You cannot say that. The letter is not in evidence.

May I ask you, Mr. Ross, is there or is there not in your course of action any connection between Plaintiff's Exhibit 3 and the conversation you have just been mentioning as one which you had with Mr. Baker? Will you answer yes or no?

The Witness: I think there is a connection, sir.

The Court: What is it? When was this Exhibit 3 created, if you know, with reference to the occasion of your conversation with Mr. Baker about which you have testified?

The Witness: I don't know as I quite follow you, sir.

The Court: Well, I cannot lead you. [27]

You may have the privilege of asking another question, and I do not wish to take up much more time with this.

Mr. Cushman: I am sorry, your Honor.

Q. (By Mr. Cushman): At what period in the transaction was this letter prepared?

A. This letter was prepared subsequent to the resale of the buildings in question and their removal from the project. I might add that it was, to the best of my recollection, requested of me by the

(Testimony of Charles W. Ross.)

disposition officer of the Public Housing Administration.

Q. For what purpose?

A. To give them a summary of the data for the purpose of considering suit against the Oceanic Lumber & Wrecking Company.

Mr. Cushman: Your Honor, I move the admissibility of Plaintiff's Exhibit 3.

Mr. Thatcher: I should like to still insist on my objection, your Honor.

The Court: The objection is sustained with the privilege of connecting it up in some way with the defendant. It ought to be connected up some way. The mere fact that it was done within the course of his official [28] duty in employment does not up to this time, in my opinion, sufficiently establish admissibility. If it was done pursuant to some negotiations with the defendant by some official, and if afterwards the contents of it were brought to the attention of the defendant, or if, in pursuance of it, some course of action was taken by some one, and that course of action was brought to the attention of the defendant—something else is needed to establish admissibility, in my opinion, and I do wish you would proceed because I think you should have been prepared to proceed with these simple matters more expeditiously.

The Court at this time will be at recess five minutes.

(Recess.)

(Testimony of Charles W. Ross.)

The Court: You may resume the interrogation of the witness.

Mr. Cushman: I would like to have this letter marked as Plaintiff's Exhibit No. 5.

The Clerk: No. There has been no Plaintiff's Exhibit No. 4. This will be marked Plaintiff's Exhibit No. 4.

(Letter dated Nov. 9, 1948, marked Plaintiff's Exhibit 4 for identification.) [29]

Q. (By Mr. Cushman): Mr. Ross, state if you know what that letter is. That is Plaintiff's Exhibit 4.

A. This exhibit is a copy of the letter which I delivered in person to the Oceanic Lumber & Wrecking Company, along with their copy of the accepted contract, which I asked that the receipt be acknowledged by countersigning this copy.

Q. And is there such receipt?

A. Yes. It is signed by William A. Baker.

Q. And what transactions were involved?

A. In this letter?

Q. What transactions does the letter concern?

A. This letter concerns the delivery of the contract for the purpose of the three buildings.

Q. No. No. I am just identifying the letter. I would like to know what buildings does it concern or who are the parties?

A. It concerns the sale of the three buildings by the Government to the Oceanic Lumber & Wrecking Company.

(Testimony of Charles W. Ross.)

Mr. Cushman: Your Honor, I move the admission of this letter.

The Court: Any objection?

Mr. Thatcher: I have no objection, your Honor. This relates to Exhibit 1, that is to [30] three Seattle units.

The Court: Admitted.

(Plaintiff's Exhibit No. 4 received in evidence.)

PLAINTIFF'S EXHIBIT No. 4

Housing Authority of the City of Seattle

825 Yesler Way

Seattle 4, Washington

November 9, 1948.

Oceanic Lumber & Wrecking Company,
10701 East Marginal Way,
Seattle 88, Washington.

Gentlemen:

I enclose herewith an accepted copy of the contract for the purchase of Buildings Nos. 10, 20 and 24, of Project No. WASH-45245. There is a balance of \$3,320 due on this contract. Will you kindly arrange to make the final payment and furnish performance bond as specified in the General Conditions, attached to and made part of the contract.

Will you please acknowledge receipt of this letter

(Testimony of Charles W. Ross.)

and the enclosed contract by signing and returning the two copies of this letter.

Sincerely yours,

CHARLES W. ROSS,
Executive Director.

CWR:PL

Receipt acknowledged: November, 1948.

/s/ WM. A. BAKER.

Admitted in evidence August 4, 1954.

Mr. Cushman: I wish to have this entered. This is to show that demand was made.

(Letter dated Nov. 15, 1948, marked Plaintiff's Exhibit No. 5 for identification.)

Mr. Cushman: Plaintiff's Exhibit No. 5, your Honor, was presented to me by defendant's counsel.

The Court: As bearing upon what?

Mr. Cushman: It has a bearing on Plaintiff's Exhibit No. 2, on the contractual arrangement at Everett.

The Court: Do you offer it?

Mr. Cushman: I offer it, your Honor, as proof showing that a demand was made on Oceanic.

The Court: Any objection?

Mr. Thatcher: No objection, your Honor. This letter is from the original files of the defendant and

(Testimony of Charles W. Ross.)

was received by the defendant. [31]

The Court: It is admitted.

(Plaintiff's Exhibit No. 5 received in evidence.)

PLAINTIFF'S EXHIBIT No. 5

Housing Authority of the City of Everett,

Washington

General Offices

Baker Heights Addition

Everett, Washington

November 15, 1948.

Oceanic Lumber and Wrecking Co., Inc.,

10701 East Marginal Way,

Seattle 88, Washington.

Attention: Mr. William A. Baker.

Dear Sir:

Please be informed that signed copy of the contract for the purchase of building #5, Project Wash. 45073 has been returned to my office and will be delivered to you upon payment of balance due on contract.

We are very desirous that you take care of this matter as soon as possible in order that you may

(Testimony of Charles W. Ross.)

expedite removal of the buildings as per your agreement in said contract.

Very respectfully yours,

HOUSING AUTHORITY OF
THE CITY OF EVERETT,

/s/ S. FRANK SPENCER,
Executive Director.

SFS:glh

[Envelope]

[Postmark]

[Cancelled 3 cent Stamp.]

[Postmark]: 7:30 p.m., Nov. 15, 1948;
Everett, Wash.

[Return Address]:

After 5 days, return to
Housing Authority
of the City of Everett,
1131 Rainier Ave.,
Everett, Washington.

[Addressed to]: Oceanic Lumber and Wrecking Co.
10701 East Marginal Way,
Seattle 88, Wash.

Att: Mr. William A. Baker. -

Admitted in evidence August 4, 1954.

Mr. Thatcher: It is a letter informing the defendant of the award of the contract on Exhibit 2 items, the Everett item.

(Testimony of Charles W. Ross.)

Mr. Cushman: May I have this marked Plaintiff's Exhibit 6, please?

The Clerk: Plaintiff's Exhibit 6.

(Copy of Certificate of Settlement marked Plaintiff's Exhibit No. 6 for identification.)

Mr. Cushman: Pursuant to stipulation, your Honor, Plaintiff's Exhibit 6, which is the Certificate of Settlement made by the General Accounting Office, concerns all the buildings both in the Everett and the Seattle area that are involved in this transaction and is a demand letter to defendant. The defendant, I believe, will admit the truth of all of the figures. I wish to move the admissibility of Exhibit 6, your Honor.

Mr. Thatcher: May I ask counsel is that [32] a certified copy of the last two pages attached to the exhibits of the complaint?

Mr. Cushman: Yes, it is a copy. It is not a certified copy.

Mr. Thatcher: That is all right. I have no objection as to authenticity.

The Court: It is admitted.

Mr. Thatcher: Just a minute. I have objection to its offer on a general basis, in that any of the conclusions contained in the letter having the words, "defaulted," "loss," "due," "settled," etc., anything like that in connection with the action of the General Accounting Office are conclusions of that office and not binding upon this Court or the defendant.

(Testimony of Charles W. Ross.)

The Court: The objection is overruled. Plaintiff's Exhibit 6 is now admitted.

(Plaintiff's Exhibit No. 6 received in evidence.)

PLAINTIFF'S EXHIBIT No. 6

(Copy)

Certificate of Settlement

General Accounting Office

Claim No. Cont-Z-170996-TSP.

Washington 25, April 3, 1950.

Certificate No. U.S. 50218.

Oceanic Lumber & Wrecking Company, Debtor,
10701 East Marginal Way,
Seattle 88, Washington.

I certify that I have examined and settled the claims(s) of the United States against the person named above for loss sustained by the Government by reason of debtor's default under contracts No. (Wash-45245), dated November 5, 1948, and No. HA (Wash-45073) dph-2, dated November 10, 1948,

(See attached sheet.)

and find the sum of Two Thousand Seven Hundred Twenty-three dollars and seventy cents is due the United States from the above-named debtor(s), to be deposited to the credit of 866523 Deposits, Disposition or Removal, War Housing Program, Public Housing Administration, Housing and Home Finance Agency.

(Testimony of Charles W. Ross.)

The amount found due should be remitted to this office promptly by check, draft, or money order(s) payable to "Treasurer of the United States."

LINDSAY C. WARREN,
Comptroller General of the
United States,

By LOUIS GERTLER.

\$2,723.70.

Copy to: Housing and Home Finance Agency,
Public Housing Administration,
Washington 25, D. C.

Re: FISCAL:MAS:CA-2.

The debtor agreed to purchase Government-owned buildings known as Nos. 10, 20, and 24, located at Seattle, Washington, Project Wash-45425 for a total bid cost of \$3,600, on which it made a deposit payment of \$280.

By contract No. HA (Wash.-45073) dph-2, the debtor agreed to purchase Government-owned Building No. 5, located at Everett, Washington, Project, Wash-45703 for a total bid cost of \$1,500, on which it made a deposit payment of \$75.

The debtor defaulted under its contracts and the buildings were later advertised and resold, resulting in a loss to the Government in the amount of \$2,723.70, as shown by the following statement:

Project WASH-45245:

| | |
|-----------------|------------|
| Building No. 10 | \$1,200.00 |
| “ No. 20 | 1,600.00 |
| “ No. 24 | 800.00 |

Total Bid \$3,600.00

Resale:

| | |
|-----------------|-----------|
| Building No. 10 | \$ 460.50 |
| “ No. 20 | 560.00 |
| “ No. 24 | 355.00 |

Total Resale \$1,375.50

Recap:

| | |
|--------------|------------|
| Total Bid | \$3,600.00 |
| Total Resale | 1,375.50 |

| | |
|----------------|------------|
| Difference | \$2,224.50 |
| Cost of Resale | 39.20 |

| | |
|--------------|------------|
| Net Loss | \$2,263.70 |
| Less Deposit | 280.00 |

Total Loss \$1,983.70

Project WASH-45073:

| | |
|----------------|------------|
| Building No. 5 | \$1,500.00 |
|----------------|------------|

| | |
|-----------|------------|
| Total Bid | \$1,500.00 |
| Resale | 700.00 |

| | |
|----------------|-----------|
| Difference | \$ 800.00 |
| Cost of Resale | 15.00 |

| | |
|--------------|-----------|
| Net Loss | \$ 815.00 |
| Less Deposit | 75.00 |

Total Loss \$ 740.00

Loss under Default:

| | |
|------------------------|------------|
| Project No. WASH-45245 | \$1,983.70 |
| “ “ WASH-45073 | 740.00 |

Due the Government \$2,723.70

Admitted in evidence August 4, 1954.

Exhibit 6 in this action and prayed for in the prayer

The Court: I would like you to state again—Plaintiff's Exhibit 6 is a letter from the Accounting Office, is that right, a copy of letter from the Accounting Office, to whom?

Mr. Cushman: It is a copy, your Honor, [33] of a Certificate of Settlement made by the General Accounting Office and addressed to Oceanic Lumber & Wrecking Company, which is the defendant in this case.

The Court: Well, it was not a settlement unless it was agreed to by them. Did they agree to it or endorse on it anything of the sort?

Mr. Cushman: Your Honor, this is merely by way of a demand letter.

The Court: Then it is a copy of a letter from the Accounting Office to defendant, is that right?

Mr. Cushman: Yes, your Honor.

The Court: You may proceed.

Mr. Cushman: I believe that is all. I wanted to get those in before we excused Mr. Ross.

The Court: Did you intend or are you advisedly omitting any further questions of this witness regarding Plaintiff's Exhibit 3?

Mr. Cushman: I am purposely omitting it, your Honor.

The Court: Very well. You may cross-examine this witness. [34]

Cross-Examination

By Mr. Thatcher:

Q. Mr. Ross, was there any discussion between

(Testimony of Charles W. Ross.)

you and Mr. Baker, relative to what would happen with respect to the bid deposit in the event on a re-bid, more was received than the bid of Oceanic?

A. I don't recall any discussion on that particular phase.

Mr. Thatcher: I have no further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Cushman: Your Honor, I believe with those documents the Government's case is complete.

The Court: Do you wish to rest?

Mr. Cushman: Yes, your Honor.

The Court: The defendant may proceed with its case in chief.

Mr. Thatcher: The defendant has no testimony to offer, your Honor.

The Court: Does the defendant now rest?

Mr. Thatcher: The defendant rests, also.

(Arguments made by counsel on behalf of plaintiff and defendant.) [35]

The Court: I do not see any conflict here, counsel, between the rights pursued by the Government in this case, and additional rights referred to by defendant's counsel in his argument. More especially I do not see, by reason of the matters and things pointed out in the defendant's argument, any basis for objection to the recovery by the plaintiff in this action of the items sued for an indicated as owing from the defendant to the plaintiff in Plaintiff's

(Testimony of Charles W. Ross.)
of the complaint.

It is the finding, conclusion and decision of the Court from a preponderance of the evidence in this case, that the plaintiff has sustained its burden of proof in respect to the material allegations of its complaint in this action and that it is entitled to recover of and from the defendant the sum of \$2,-723.70, together with interest thereon at the rate of 6% per annum from April 3, 1950, until the date of entry of the judgment, and is thereafter entitled to interest on the judgment at the legal rate, and is further entitled to recover its taxable costs and disbursements herein. [36]

The Court further finds, concludes and decides that the defendant take nothing by its affirmative defense herein.

Is there any other issue not covered by the Court's orally announced decision?

Mr. Cushman: No, your Honor.

Mr. Thatcher: None that the defendant is aware of, your Honor.

The Court: When can counsel conveniently meet with the Court for the purpose of settling and entering proper findings of fact, conclusions of law and judgment?

Mr. Cushman: Would Monday be possible?

The Court: Yes, it would be possible.

Will counsel in this case prepare suitable findings of fact and conclusions of law and serve them on opposing counsel before Monday?

The Court continues this case until Monday morn-

ing at 10:00 o'clock, August 9, 1954, for the purposes mentioned. Both counsel are excused until then.

(At 12:10 o'clock p.m., August 4, 1954, trial proceedings concluded.) [37]

Certificate

I, Frances I. Gilligan, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ FRANCES I. GILLIGAN,
Official Court Reporter.

[Endorsed]: Filed October 19, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and

Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original documents, excluding exhibits, in the file dealing with the above cause, as the record on appeal herein from the judgment for plaintiff filed Aug. 16, 1954, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed Jan. 27, 1953.
2. Summons with Marshal's Return thereon, filed Jan. 30, 1953.
3. Answer of Defendant, filed May 5, 1953.
4. Praecipe, Govt. for subpoena, Ross, filed Aug. 4, 1954.
5. Defendant's Trial Memorandum, filed Aug. 4, 1954.
6. Marshal's Return on Subpoena, Ross, filed Aug. 12, 1954.
7. Findings of Fact and Conclusions of Law, filed Aug. 16, 1954.
8. Judgment, filed Aug. 16, 1954.
9. Cost bill, filed Aug. 16, 1954.
10. Notice of Appeal, filed Sept. 14, 1954.
11. Cost Bond on Appeal, filed Sept. 22, 1954.
12. Court Reporter's Transcript of Proceedings at Trial, filed 9-28-54.

I further certify that the following is a true and

correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 18th day of October, 1954.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO SUPPLEMENTAL RECORD
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith, supplemental to the record on appeal in the above cause, the following additional papers or documents dealing with the action, to wit:

13. Designation of Contents of Record on Appeal, filed Oct. 19, 1954.

14. Statement of Points upon Which Defendant Intends to Rely, filed 10-19-54.

15. Court Reporter's Transcript of Proceedings at Trial, filed Oct. 19, 1954. (This is the original of Document No. 12.)

16. Order Directing Transmission of Original Exhibits, filed Oct. 20, 1954.

Exhibits Admitted in evidence: Plaintiff Nos. 1, 2, 4, 5 and 6.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 20th day of October, 1954.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14554. United States Court of Appeals for the Ninth Circuit. Aerial Lumber Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14554

AERIAL LUMBER COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

1. General Conditions (Exhibits 1 & 2) provide: "The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security." No evidence was presented by the Plaintiff as such a determination, either communicated to the Defendant or not, and Defendant contends that this was a necessary condition precedent to be proved by Plaintiff.

2. The General Conditions (Exhibits 1 & 2) provide: "The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale." Except for the costs of resale of \$54.20 there was no other expense to the Government and by virtue of the provisions of the agreement between the parties, the Plaintiff

is not entitled to loss of profits for which the trial Court gave Plaintiff the Judgment in this case.

3. The trial Court erred in admitting Exhibit 5 generally into evidence over the objection of the Defendant, p. 33 of Transcript of Proceedings at Trial.

RAYMOND D. TORBENSON,

and

RICHARD M. THATCHER,

Attorneys for Aerial Lumber
Company.

Receipt of copy acknowledged.

[Endorsed]: Filed January 11, 1955.

No. 14554

United States Court of Appeals
for the Ninth Circuit

AERIAL LUMBER COMPANY, Appellant

v.

UNITED STATES OF AMERICA, Appellee

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *District Judge*

RAYMOND D. TORBENSON and
RICHARD M. THATCHER,

Attorneys for Appellant

Office and P. O. Address:
755 Dexter Horton Building,
Seattle 4, Washington.

FILED

SEP 23 1955

PAUL P. O'BRIEN, CLERK

No. 14554

United States Court of Appeals
for the Ninth Circuit

AERIAL LUMBER COMPANY, Appellant

v.

UNITED STATES OF AMERICA, Appellee

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FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *District Judge*

RAYMOND D. TORBENSON and
RICHARD M. THATCHER,
Attorneys for Appellant

Office and P. O. Address:
755 Dexter Horton Building,
Seattle 4, Washington.

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**United States Court of Appeals
for the Ninth Circuit**

No. 14554

AERIAL LUMBER COMPANY, Appellant

v.

UNITED STATES OF AMERICA, Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION**

BRIEF OF APPELLANT

STATEMENT OF PLEADINGS AND JURISDICTION

The Appellee, United States of America, brought this action in the United States District Court for the Western District of Washington, Northern Division, to recover damages consisting of loss of profit as a result of the failure of the appellant to complete the purchase of certain dwelling units according to the parties' contract. The complaint alleged (Tr. 3) and the answer admitted (Tr. 5) that jurisdiction was conferred on that court under Title 28 U.S.C.A., Section 1345.

After trial on the merits, on August 16, 1954 the District Court entered judgment against the appellant for the amount prayed for in the complaint. (Tr. 10). No-

tice of appeal was filed September 14, 1954 (Tr. 11), and Cost Bond on Appeal by Cash Deposit was filed September 22, 1954 (Tr. 11, 12). Jurisdiction to review the judgment is conferred by Title 28 U.S.C.A., Sections 1291 and 1294 and by Federal Rules of Civil Procedure, Rule 73.

No opinion was filed by the District Court.

STATEMENT OF THE CASE

This is an action by Appellee, the United States of America, against Appellant, Aerial Lumber Company, a corporation, to recover the difference between the amount which the Appellant bid for four dwelling units, a total bid of \$5,100.00, and the amount for which the Appellee later sold the same units, \$2,075.50 (the difference being adjusted by crediting deposits of \$355.00 and debiting costs of resale of \$54.20). The Appellee recovered judgment in the United States District Court for the computed difference, \$2,723.70 and interest. (Tr. 10.)

Two separate bid transactions are involved, but, so far as is material to this action, the language of the separate Invitations to Bid, Offer and Acceptance of Offer and Statement and Certificate of Award is the same.

The Invitation to Bid (Tr. 27) is a two-page document describing "Temporary-Row Houses" to be sold by the Housing and Home Finance Agency, Public Housing Administration. It requests sealed bids from

persons in the category of Appellant, a non-priority holder. Paragraph 5 provided for a deposit securing the offer, stating as follows:

“5. All offers except those from federal, state or local government bodies shall be accompanied by a deposit securing the offer. Said deposit shall be in the form of a certified or cashier’s check or money order payable to the Housing Authority of the City of Seattle and shall be in the amount of five (5) per cent of the bid up to \$10,000 plus two (2) per cent of any amount in excess of \$10,000. The amount of the deposits made by successful bidders in accordance with this Paragraph shall be applied against the purchase price. When an offer is accepted, the unsuccessful bidders will so be notified and the checks or money orders of all unsuccessful bidders shall be immediately returned to them. Checks or money orders may be held by the Public Housing Administration without deposit and at the bidder’s risk until the successful bidders are selected.”

Paragraph 4 provides for a Performance Bond, referring to Paragraph 2 of the General Conditions.

The General Conditions (Tr. 30) were made a part of the Invitation to Bid by reference (Paragraph 1). There are fourteen paragraphs covering the subject matter, two of which deal with the possibility of the bidder failing to complete the work. One is as follows:

“2. Performance Security. The Purchaser shall

within 5 days of the delivery to the Purchaser of an executed copy of the contract supply (in addition to payment in full of the contract price) performance security in the form of a certified check, cashier's check or United States Post Office Money Order payable to the Housing Authority of the City of Seattle in the amount required under Section 4 of the Invitation to Bid, or shall supply a performance bond in a like amount. The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security."

Upon a form apparently furnished for the purpose, entitled "Offer and Acceptance of Offer," the Appellant offered to purchase certain units. The printed portions of two paragraphs referred to the General Conditions as follows (Tr. 26):

"2. The Purchaser offers and agrees to purchase from the Seller the property set forth and described in the Invitation to Bid attached to the General Conditions, such offer being governed by and subject to the General Conditions covering the sale of such property, at the following purchase price:

| | |
|---------------------------|------------|
| Building Number: 10 | \$1,200.00 |
| 20 | 1,600.00 |
| 24 | 800.00 |

“4. This offer shall be binding upon the purchaser, his (its) successors and assigns in the manner and for the period, and may be accepted by the Seller, all as set forth in the General Conditions and the Invitation to Bid.”

Paragraph 3 of this document provided for payment of money to be “held and applied as set forth in the Invitation to Bid.”

The Appellant’s bids to purchase offered to pay more money for four units than other bidders offered to pay. The Contracting Officer for the Government, M. C. Redman, thereafter issued the “Statement and Certificate of Award” in regard to the four units (Trs. 22-36). No formal contract document was signed by both of the contracting parties (Tr. 54).

As a result of the failure of the Defendant to go forward to perform the work and pay the price, the four units were rebid, the Appellee receiving and accepting offers from others to pay less than Appellant had offered. The units were, therefore, sold for these lower prices and Exhibit 6 shows the computation of the amount which the Appellee claims due (Tr. 62).

QUESTIONS INVOLVED

1. Is the Government entitled to recover loss of profit (the difference between the purchase price bid by appellant for the dwelling units and the lower price for which they were sold) as a result of the failure of the appellant to pay the purchase price and commence to remove the property in light of the provision of paragraph 2 of the General Conditions stating: "the Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale . . .?"

2. Where the contract provides "The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with the provisions of this sale . . . ," may the seller recover any damages without having proved a determination of damages by such Officer?

3. Did the trial Court commit prejudicial error in admitting generally into evidence a letter from the Comptroller General of the United States addressed to appellant, entitled "Certificate of Settlement," purporting to settle the claim of the United States against the appellant and fixing the amount "due"?

SPECIFICATIONS OF ERROR

1. The Trial Court erred in entering Finding of Fact IV (Tr. 8) in which the Court found the damage to the Appellee in the principle sum of \$2,723.70, plus interest.

2. The Trial Court erred in entering Conclusions of Law I and II (Tr. 9) in which the Court concluded that the Appellee was entitled to recover judgment against Appellant on account of the contract in the principle sum of \$2,723.70, plus interest and to recover judgment for costs and disbursements.

3. The Trial Court erred in entering judgment against the Appellant in the sum of \$2,723.70, together with interest and costs, or in any sum.

4. The Trial Court erred in admitting Exhibit 6 generally into evidence (Tr. 60) over objection by Appellant (Tr. 59) as to its offer on a general basis in that the words "defaulted," "loss," "due," "settled," etc., were conclusions of the General Accounting Office and not binding upon the Trial Court nor upon the Appellant. Exhibit 6 (Tr. 60-62) is a letter from the Comptroller General of the United States to Appellant entitled "Certificate of Settlement" containing the statement of the writer that he had settled the claims of the United States for loss sustained by reason of debtor's default, finding \$2,723.70 due, reciting that the debtor agreed to purchase certain buildings but defaulted un-

der its contracts and upon resale there was a loss to the Government. The letter contained a statement of the various bids, costs of resale and computation of losses claimed.

SUMMARY OF ARGUMENT

Specifications of Error 1, 2 and 3 will be argued together. The arguments under Headings I and II, treating respectively with questions 1 and 2 set forth above, will each involve the error of the Trial Court in finding compensable damage to the Appellee and in entering Conclusions of Law and Judgment in Appellee's favor.

Specification 4 will be argued under Heading III.

Under Heading I, it will be demonstrated that the law permits parties to a contract to specify the limit of each's liability in the event of breach; that in the contract between these parties, the liability of Appellant in the event of its failure to comply with the terms of the contract was limited to expense incurred by the Appellee; and that no item of expense being included in the \$2,723.70 sought by the Appellee, no judgment should have been rendered against Appellant in this case.

Under Heading II, it will be urged that as there was no evidence that the Contracting Officer of the Housing and Home Finance Agency, Public Housing Ad-

ministration, had made a determination of damages, the Appellee was not entitled to any judgment for damages occasioned by the failure of Appellant to comply with the provisions of the sale by paying the purchase price and removing the dwelling units. From Appellant's standpoint, its liability for damages pursuant to the contract terms was conditioned upon that Officer making a determination which would be binding upon both parties as to questions of fact.

Under Heading III, the Appellant will assert the error in admitting Exhibit 6 into evidence without restriction as to purpose and effect. Other than as a demand, it does not constitute a substitute for a determination of a Contracting Officer. It was irrelevant and immaterial in so far as it purported to state any conclusions of fact or law.

ARGUMENT

I. A—The court enforces the agreement the parties made.

The relationship between the parties in each of the two purchase transactions was created by the following documents: 1—Statement and Certificate of Award (Tr. 22, 36); 2—Offer and Acceptance of Offer (Tr. 25, 39); 3—Invitation to Bid (Tr. 27, 41); 4—General Conditions (Tr. 30). Paragraphs 2 and 4 of the Offer and Acceptance of Offer made it subject to the General Conditions, and the Invitation to Bid (Tr. 26, 40) re-

cited that copies of the General Conditions had been furnished the Appellant before the offer was made (Tr. 25, 39).

In the General Conditions, the Appellant was informed that it must pay the full purchase price and furnish a performance bond. Appellant was informed by the "Scope" (of the work) (Paragraph 3, Tr. 30) of the various details it must provide for or guard against in the physical process of getting what it bought. Other paragraphs of the Conditions contained standard clauses in regard to relationship of third parties to Appellant.

In addition to telling Appellant what it must do or refrain from doing, Paragraph 2 of the Conditions told Appellant, in plain, non-technical language, what would happen if it failed to act or acted in violation of the terms in the following language:

"The purchaser is liable for *any expense* incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition." (Tr. 30)

The Appellee claimed in Paragraph V of the Complaint, in effect, that Appellant had utterly failed to abide by the terms of the sale (Tr. 4) and the trial court so found (Findings of Fact III, Tr. 8). But the contract told Appellant that even if it so failed, it would

only be compelled to pay “any expense.” All elements of the judgment granted to Appellee of \$2,723.70 which fail to fall within the definition of “expense” are unwarranted in law.

In the construction of written contracts, it is a standard rule of interpretation that where the parties have treated of a subject, the scope of their agreement in regard to it must be ascertained from the instrument.

In 12 *Am. Jur., Contracts*, p. 749, et seq, Sec. 228, it is said:

“§ 228. No Right to Make Agreement for Parties. Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed. Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties. If the parties to a contract adopt a provision which contravenes no principle of public policy and contains no element of ambiguity, the courts have no right, by a process of interpretation, to re-

lieve one of them from disadvantageous terms which he has actually made.

There is no right to interpret the agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ. The court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter or of any material incident, or to insert words which the parties have not made use of. It cannot reject what the parties inserted, unless it is repugnant to some other part of the instrument. The court can properly interpret a contract only as the parties make it, and cannot substitute words for those used by them. Neither a court of law nor a court of equity can interpolate in a contract what the contract does not contain.

The court has no power by interpretation to engraft on a contract a limitation inconsistent with the apparent object of the parties. It cannot interpolate a stipulation or words into a contract where such are not implied by anything that appears on the face of the contract and where the surrounding circumstances do not authorize or require a construction of the contract that would import such stipulation or words into it. It can go no further than to collect the intention from the language employed as applied to the subject matter in view of the surrounding circumstances."

By very plain language, the form prepared by the Appellee fully covered what the Appellant might expect as consequences in the event it failed to abide by the terms.

B—"Expense" means money paid out but does not include loss of profit.

"Expense" is defined in 35 *C.J.S.* 207 as follows:

"EXPENSE or EXPENSES." The substantive form of the verb "expend" having its origin in the Latin word "expendere," "ex" meaning "out," and "Pendere" meaning "to weigh." While the word is one of somewhat varying significance, depending on the connection in which it is used, its meanings, both in popular speech and law, are well established, although the two may differ; and it has been variously defined as the act of expending; disbursement, or expenditure; disbursement or money, or the laying out or expending of money or other resources; an actual and honest disbursement; but the term is not limited to expenditure of money, or to pecuniary expense, for it may mean the employment and consumption of time, labor, strength, or thought; the habit of expending; also that which is spent; charge, as expenses for the journey, or cost; money expended or actually paid out; outlay; the payment of a price; and also burden of expenditure, consumption, or loss, as at the expense of health or time."

See, also, *Williams v. United States*, 12 Ct. Cl. 192 @ 199 where it is said:

"But the word 'expense,' both in its etymology and ordinary use, indicates expenditure, outlay, the distribution of money, the payment of a price."

The definitions above, and the common understanding of the word, means paying out something but does

not go so far as to include an item of failure to receive—loss of profit.

None of the items of the judgment sought and granted against Appellant include a “paying out.” The Appellant deposited a total of \$355.00 as bid deposit (Tr. 26, 40, 62). The Appellee “paid out” in cost of resale \$54.20 (Tr. 62). All other items of the judgment represent the difference between the amount of Appellant’s bid and the amount received upon subsequent resale, or “loss of profit.”

C—The provision of a contract limiting liability of a defaulting party will be enforced.

The text writers and the courts have long and universally recognized the right of parties to a contract to limit the liability of a defaulting party to a measure of damages amounting to less than the damages or relief which the usual standards of law would otherwise afford. In this regard, the *Restatement of Contracts*, Vol. 1, Sec. 339 (g) states: (p. 554)

“An agreement limiting the amount of damages recoverable for breach is not an agreement to pay either liquidated damages or a penalty. Except in the case of certain public service contracts, the contracting parties can by agreement limit their liability in damages to a specific amount, either at the time of making their principal contract, or subsequently thereto. Such a contract does not purport to make an estimate of the harm caused by a

breach; nor is its purpose to operate in terrorem to induce performance.”

Corbin on Contracts states in Vol 5, p. 323, Sec. 1068:

“The courts see no harm in express agreements limiting the damages to be recovered for breach of contract. Public policy may forbid the enforcement of penalties against a defendant; but it does not forbid the enforcement of a limitation in his favor. Parties sometimes make agreements and expressly provide that they shall not be enforceable at all, by any remedy, legal or equitable.”

We find *Williston on Contracts*, Vol. 3, p. 2197, Sec. 781A, treating the subject in the following language:

“Contractual limitation of liability to an agreed maximum must be distinguished from a penalty or liquidated damages, though every valid agreement for liquidated damages operates as a kind of limitation. Aside from certain restrictions in the field of public utility law, chiefly relating to common carriers, if the agreed amount to which liability is limited is something more than a merely nominal sum, the validity of the provision has long been recognized. It is neither a penalty in that it does not normally operate in terrorem to induce proper performance nor is it of the nature of liquidated damages since it does not purport to be a pre-estimate of probable damages resulting from a breach.

The Supreme Court of the United States has applied the principle of limitation of liability in connection

with a claim by the United States against a contractor for per diem liquidated damages upon delay or failure to complete the work. In *Stone, Sand & Gravel Co. v. United States*, 234 U.S. 263, 34 S Ct. 851, 58 L Ed. 1305, the contractor who had agreed to remove earth for payment of 8.49 cents per cubic yard did not commence the work on time. Formal notice was given it that in accordance with the contract, the contract was annulled. The work was relet at a price to the Government of 12.4 cents per cubic yard. The action was for the damages measured by the difference in the cost to the Government. The contract provided in Clause A that if the contractor failed to commence the work, the contract could be annulled "and upon giving of notice all money or reserved percentage due" would be forfeited. In Clause B, it was provided that in case of failure to complete, in addition to forfeiture of monies due, the United States had the right to recover sums in excess of contract price required to complete the work. The Court held the United States not entitled to recover. In answer to the contention of the Government that it had an inherent right to annul the contract, apart from Clause A, upon the failure of the contractor to commence and upon annulment, the right to recover all damages followed, the Court said:

"But we need not deal with the consequences as if Clause A had been omitted. The right might have been inherent, or not so vital as to justify the vigor of annulment. Both parties elected to deal

with the matter by express stipulation and that should be and is the end of it.”

See, also, *United States v. O'Brien*, 220 U. S. 321, 31 S. Ct. 406, 55 L. Ed. 481, where, in considering the same contract as in the *Stone Case*, the court limited the recovery of the United States to that provided by the contract with the admonition that:

“If the United States wants more, it must say so in plainer words.”

The court has stated the rule in *United States v. Harris*, 10 F. (2d) 268 (CCA9, 1938), a case involving the other side of the problem, where the United States recovered as provided by the agreement, saying: (p. 278)

“It is well settled that parties to a contract may themselves make provision for the measurement of damages in the event of a breach. Such provision, if not unreasonable, will be given effect.”

In *American Surety Co. of New York v. Woods*, 105 F. 741 (CCA5, 1901) recovery of damages for failure to continue with work on a sewer job was denied where the Sewerage District went into the hands of a receiver and did not incur expense in finishing the job. The contract had provided that upon delay by contractor, the company could finish the job and the contractor would pay the difference between the contract price and the excess cost to the Sewerage Company.

In *Jewett, Bigelow & Brooks v. Detroit Edison Co.*, 274 F. 30 (CCA6, 1921) (cert. den. 257 U.S. 641, 66 L.

Ed. 411) the contract provided that seller would pay 20 cents per ton for each ton short in shipments. The buyer had recovered a judgment below substantially greater for failure to ship. In reversing, the court said: (p. 38)

“A court will not disregard the express provisions of a contract in reference to liquidated damages upon the theory that the amount named is too small, but rather only for the reason that the amount named is so extravagant and excessive as to indicate that it was intended as a penalty and not compensation, or that the amount was so excessive as to imply fraud, mistake, circumvention or oppression.”

The court noted that the buyer was seeking to avoid provisions of its own contract form.

The Supreme Court of the State of Washington applied the rule that parties are limited to recovery provided by the contract in *Smith v. Lambert Transfer Co.*, 109 Wash. 529, 187 P. 362.

For factual situations similar to the present case, where the court held the defaulting party to have limited his liability, see *Mooney v. Van Kleeck Mortgage Co.*, 75 Colo. 173, 225 P. 210, and *Catterlin v. Voney*, 177 F. 527 (D. C. Ore. 1910).

The language of the General Conditions includes “property available for sale” (Paragraph 1, Tr. 30), the “Purchaser” shall do or not do (Paragraph 2, 3, 4, Tr. 30, 31, 32). The Offer and Acceptance of Offer re-

fers to Appellant as “Purchaser” (Tr. 25). The Transaction was clearly that of a sale of property with other elements incidental to removing that property.

In the law of sales, parties have uniformly been permitted to limit their liability under the general law by appropriate language in the contract. For example, in *Tucker v. Traylor Engineering and Mfg. Co.*, 48 F. (2d) 783 (CCA 10, 1931) the court held it had no power to enlarge on the terms of an agreement restricting the obligation of the seller in the event of a defect, to repair or replacement for one year.

The last sentence of Paragraph 2 of the General Conditions, to-wit: (Tr. 30)

“The purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply withp rovisions of this sale . . .”

does not enlarge the liability of the Appellant. If it can be said that the word “damage” is more general than the word “expense,” including within its meaning loss of profit, the doctrine of ejusdem generis will limit its meaning to the enumeration of the specific preceding it.

“Damages” does not have a general meaning which will enlarge the stipulation here of relief to the Appellee as being confined to what it paid out. “Damages” means compensation for a breach, measured in terms of the contract. *George W. Blanchard & Sons Co. v.*

American Realty Co., 115 A. 4, 6, 80 N.H. 161. See, also, 25 *C.J.S.* 452 defining damages as "the total amount which plaintiff may recover under correct principles of law . . ."

This last sentence, obviously, was placed in the paragraph to provide for the usual method found in many government contracts of appointing a contracting officer as an arbitrator of questions of fact.

In construing the relationship of the two sentences, the construction should be more strongly against the Appellee who prepared and furnished these forms. *Texas Pacific Ry Co. v. Reiss*, 183 U. S. 626, 22 S. Ct. 253, 46 L. Ed. 358.

The evidence in the case shows expense or money paid out by Appellee of \$54.20 and payment by Appellant of \$355.00 as bid deposit. The evidence fails to show any further money paid out. Appellee is not entitled to judgment in any amount because Appellant's limited liability has been more than satisfied.

II. In failing to prove a determination by the Contracting Officer of damages, Appellee failed in its proof of a right to recover any amount.

The court found the "damage" to Appellee to be \$2,723.70, the principal of the judgment entered (Tr. S. 10). However, there was no evidence submitted of a determination, with or without a hearing upon notice,

of damages by the Contracting Officer as required by Paragraph 2 of the General Conditions (Tr. 30).

This provision, in effect a sort of arbitration, is binding on all parties. *United States v. Moorman*, 338 U.S. 456, 70 S. Ct. 288, 94 L. Ed. 256.

Where a contract provides for the submission of questions of fact to an arbitrator, proof of such submission is a necessary condition precedent to the bringing of suit against the United States. *United States v. Holpuch*, 328 U. S. 234, 66 S. Ct. 1000, 90 L. Ed. 1192.

It would, therefore, appear that in the interest of mutuality of contracts, the same rule should apply to the United States as plaintiff, the alternative being that the sentence should be totally disregarded.

Such determination would not be binding on the parties in regard to matters of law. *Gemsco Inc. v. United States* (1950), 115 Ct. Cl. 209, and it is Appellant's contention that by law under the contract only out-of-pocket items may be considered as damage. It may be that such an interpretation was made by the Contracting Officer and overruled by the General Accounting Office. In one particular the Contracting Officer may well have arrived at a different conclusion because of his familiarity with bids in these matters. While re-reading the Appellant's offer for the Everett unit (Tr. 39) counsel for the first time noticed that

the language of the bid was "\$250.00 per unit" and "Preferable No. 5 or 3 or 4 or 6 or 7." At the trial, counsel not having noted this language but noting the language of the award (Tr. 38) stipulated that "if the defendant is liable, the defendant has no quarrel with the accuracy of the figures or statement made in the certificate of settlement." Any issue of amount of this judgment is not in this case at this time, but the necessity of the Government proceeding with a timely determination by the Contracting Officer, upon notice, in an orderly fashion while the facts are fresh in the minds of the participants becomes apparent.

III. The letter of the Comptroller General was incompetent to prove any element of Appellee's case.

Plaintiff's Exhibit 6 was admitted in evidence generally over objection by Appellant (Tr. 59, 60). Its effect upon the court is unknown but it was inadmissible for any purpose other than possibly demand if demand was necessary. Certain figures were competent pursuant to stipulation (Tr. 18).

Obviously, the action of the General Accounting Office can have no bearing on the rights of the parties to the contract in suit. It is not a substitute for a determination by the Contracting Officer, an officer and employee of the Housing & Home Finance Agency, Public Housing Administration (Tr. 22-24).

CONCLUSION

When the time for entering upon performance arrived, the Appellant had two choices. Those choices were (1) to enter upon performance or (2) fail to do so and suffer what consequences the contract might impose. In lay English, the contract spelled out suffering to the extent of repaying the Government what the latter paid out. The Appellant chose course No. 2 and is to be morally blamed no more than the buyer of real estate who forfeits his earnest money rather than move into the house.

The law, by virtue of the doctrine of limitation of liability, conforms with what we describe as lay English and the Appellee's judgment for loss of profit cannot stand.

Respectfully submitted,

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

AERIAL LUMBER COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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BRIEF OF APPELLEE

JURISDICTION

The District Court had jurisdiction of this action under 28 U.S.C. 1345. Appellant appeals from the judgment entered below on August 16, 1954. Notice of Appeal was filed September 14, 1954. Jurisdiction of this court is conferred by 28 U.S.C. 1291.

STATEMENT OF FACTS

Appellee United States of America brought this action below to recover from appellant damages for the breach of a contract to purchase and remove certain Public Housing Authority "surplus" dwellings. Two separate sales were included in the action, however, because the contractual relationships were identical; no further attention need be given this fact.

Appellant submitted the highest bid for four dwelling units and was awarded the "contract." This "contract" is the summation of the relationship between the parties as contained in the following documents:

Invitation to Bid (R-27).

General Conditions (R.-30) incorporated in the invitation to bid by reference.

Offer and Acceptance of offer (R-25).

Statement and Certificate of Award (R-22).

It is not disputed that the contractual relationship was entered into; therefore, the arguments of the parties, in this court, will primarily be directed to the provisions of the "General Conditions".

Upon appellant's failure to pay the purchase price and remove the dwellings, appellee reoffered the dwellings, receiving offers to purchase in lesser

amounts. The damages sought by appellee below were the differences between the prices offered by appellant and those received on subsequent sale, together with the expenses of sale.

QUESTION PRESENTED

Is the normal measure of damages for breach of contract so limited by the instant contractual provisions that appellee is restricted to a forfeiture of the deposit and reimbursement of actual "out-of-pocket" expenses?

SUMMARY OF ARGUMENT

There is no dispute as to the entrance into the contractual relationship here in question. Further it is admitted that appellant breached the contract by failing to pay the purchase price or performing any of the subsequent conditions.

Therefore, assuming the absence of specific language to the contrary in the contract, the normal rule of damages for breach of contract would apply and appellee would be entitled to recover the difference between the price offered by appellant and that received on subsequent sale after breach, together with additional expenses. This theory was used by the court below in awarding judgment for \$2,723.70 plus interest and costs.

Appellant, with special reference to paragraph 2 of the General Conditions (R-30) contends that appellee is limited in its recovery to its "out-of-pocket" expenses and a forfeiture of the deposit accompanying the offer, except in a case where a specific determination by the Contracting Officer of the amount of damages has been made. However, Paragraph 2 of the General Conditions cannot be read apart from the remainder of the contractual language and as will be shown this paragraph has only limited applicability to the damage question, even if interpreted as appellant contends.

Assuming for argument's sake that paragraph 2 of the "General Conditions" wholly governs the remedies for breach and that the term "expenses" as contained therein does not cover a "loss of profit," then it becomes necessary to consider when and to what extent a determination by the Contracting Officer is necessary. Appellee introduced testimony through its witness, Charles Ross, that showed that appellant was informed of the intention of appellee to hold appellant liable for "loss of profit." Appellant was thereafter advised of the amount of appellee's claim by the General Accounting Officer Certificate of Indebtedness, April 3, 1950. At no time has there been any issue as to the calculation of damages. It is a well-settled proposition that the law does not require the perform-

ance of a condition such as this "determination," which is wholly unnecessary.

ARGUMENT

I.

THE CONTRACTUAL PROVISIONS

Appellant's argument that the Court cannot remake a contractual agreement between the parties is conceded. However, in the instant case, we have the typical contract dispute situation, i.e., that the contractual documents are not complete and free from ambiguity. Appellant centers all its attention on paragraph 2 of the General Conditions, R-30, and argues that this paragraph allows appellee to recover no more than its "out-of-pocket" expenses, which were only the cost of readvertising the buildings and the amount of the deposit accompanying the offer, or \$355. The last sentence of that paragraph is argued to be inapplicable inasmuch as the evidence did not show that appellant received a determination by the Contracting Officer of the exact amount of damages.

It is important first, to consider that paragraph 2 is only part of the "whole" contract. That paragraph is headed "Performance Security" and that clearly shows the scope of its intended operation. The references as to "expenses incurred by the govern-

ment" shows the primary reasons for the requiring of the bond. To reimburse the government if government funds have to be utilized to complete clearing the site or the dismantling of a partially-removed building, without being forced to rely on a questionable credit risk and the problems of a lawsuit for a relatively minor sum. It is to be noted that in situations of the type above noted, a resale would probably not be practical because no expense can be presumed necessary until performance has begun.

Appellant further relies on restrictions argued from a consideration, out of context, of the last sentence in this paragraph which provides for damages as determined by the contracting officer. Again, the overall purpose of the provisions must be considered, and it is clear that the intention in this sentence was merely to show that the performance security when posted was not to be considered by way of liquidated damages, but on the contrary that there would be damages or expenses which would exceed the amount of the performance bond, which expenses would be a fit subject for determination by the Contracting Officer.

If we assume for purposes of argument, that paragraph 2 is intended to provide the only procedures governing a breach of contract, a study of the other portions of the General Conditions will show that this

paragraph is incomplete and in large measure inconsistent with these other provisions. [In this regard the court's attention is called to the incompleteness through oversight of the record in that page 2 and a portion of page 1 of the General Conditions was designated and not printed. It is set forth hereafter in Appendix A.] Paragraph 3 thereof provides for recovery of the dwelling structures on certain conditions. No mention is made of any requirement that this be conditioned on a determination by the Contracting Officer. Paragraph 6 provides that on certain other conditions the government may take the buildings and charge the purchaser with all costs of performance together with a forfeiture of the purchase price. Again this provision is without reference to any action by the Contracting Officer.

It is interesting to note that paragraph 6 presupposes payment of the full purchase price. In effect the purchaser stands to lose the purchase price plus any expenses suffered by the government. All without any determination by the Contracting Officer; a far more serious liability than that faced by a purchaser who defaults initially. It should also be noted that appellant's argument (p. 19 of Appellant's brief) to the effect that the last sentence of paragraph 2 is limited to "expenses" and that this is the contract's exclusive remedy for breach is belied by the presence

in the conditions of the other remedy provisions above noted.

The Invitation to Bid (R-27) requires in paragraph 5 a deposit in all sales of a similar nature. This deposit is only intended to insure payment of the purchase price, and is directed to be applied thereon hence it is clear that the purchase price is in no way to be secured by the performance security. That this is the case is seen by the provision in parentheses in paragraph 2 that the full purchase price is to be paid simultaneously with the delivery of the performance security.

Why then was a provision assumed by appellant to govern all breaches, included in this paragraph which is directed entirely to relationships subsequent to the time of breach, i.e., after payment of the purchase price in the instant case? On the other hand it is very logically explained, as in fact appellant virtually concedes, if we consider the last sentence as merely an amplification of the procedure to govern the liability for expenses outlined in the sentence above. It is well known that detailed matters of expenditures in a complicated situation are typically matters where government contracts provide for a fact determination by a Contracting Officer. The usual government contract does provide that a deter-

mination of all *factual* disputes shall be made by the Contracting Officer. A complete failure to perform as in this case presents virtually no question of disputed fact and is wholly inappropriate for determination by a Contracting Officer.

Are the portions of paragraph 2, where applicable, typical liquidated damages provision? The paragraph is incomplete in the sense that many breach situations are covered by other contract provisions. It is in a paragraph which has little meaning until the happening of future events, i.e., the posting of performance security and the payment of the price. Contractual provisions limiting liability cannot be inferred from mere ambiguous language, particularly where that language is not sufficiently complete to cover most of the potential breach situations.

II.

FINDING BY THE CONTRACTING OFFICER

What type of a finding by the Contracting Officer is necessary under Paragraph 2 of the General Conditions?

Assuming for purposes of argument only, that appellee must recover "lost profit," if at all, under the last sentence of paragraph 2, what then is the function of the Contracting Officer? The facts of this case are not now in dispute and never were. The breach

was clear and in fact as shown by the testimony of appellee's witness Ross (R-50) the problem of breach was discussed by that witness with appellant's president prior to readvertising of the buildings. This same witness (R-46) testified that he was a representative of the Contracting Officer. The testimony showed at least one later contact between the witness Ross and appellant on the occasion of the delivery of the certificate of award. Witness Ross testified (R-53) that he prepared and sent to the Regional Disposition Officer of the Public Housing Authority a summary of the data in this case for the purpose of considering suit against Oceanic (now Aerial) Lumber and Wrecking Company.

It is a logical inference from this witness's testimony that the General Accounting Officer Certificate of Settlement (R-60) was prepared from the data submitted by Ross. This is clearly compliance with paragraph 2 since it merely calls for a "determination" without regard to any particular form or its communication to the defaulting party.

Again assuming for argument's sake, no compliance with this provision, without any issue of fact to be decided by the Contracting Officer, how can appellant take advantage of a provision which is no more than an empty formality? At best it would serve

only as notification of the price of the subsequent sale. This was amply provided for by the General Accounting Office Certificate.

The provision for a determination by the Contracting Officer does not touch on any of the formalities of its execution. No time is set for the action, no requirement of a writing is imposed nor does the provision even provide that notification to the purchaser be given. Certainly no determination by the Contracting Officer could have been made prior to resale and at that time the purchaser's obligation became permanently fixed. The appellant cannot claim prejudice to his rights because a determination came from the General Accounting Office instead of from the individual he considered to be the Contracting Officer.

Appellant argues that the court cannot revise the parties' contractual agreement. This proposition does not, however, require absolute compliance with contractual terminology to the extent of requiring the doing of a useless thing.

CONCLUSION

Paragraph 2 of the General Conditions does not embody all the possible remedies for breach of this contract. Others are specifically spelled out elsewhere in the document, and show the ambiguity and incom-

pleteness of that paragraph. It is necessary to go outside the documents themselves in this fact situation and apply the usual principles of contract law pertaining to a breach, i.e., that the injured party shall be placed in the same position he would have occupied if the contract has been performed. 15 Am. Jur. 43.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

F. N. CUSHMAN
Assistant United States Attorney
Attorneys for Appellee

APPENDIX A

(Continued from Record P. 32)

4. *Licenses and Permits.* The Purchaser shall obtain and pay for all required permits, licenses and fees necessary in connection with its work, without cost or expense to the Government.
5. *Liability for Protection.* The Purchaser shall assume responsibility and be liable from and after the date of delivery to the Purchaser of an executed copy of this contract, for the care and protection of the property conveyed by this instrument.
6. *Time of Commencement and Completion of Work.* The Purchaser shall not commence work until he has made payment in full of the purchase price and until delivery to the Government of the Performance Security required under Paragraph 2 hereof and shall complete the removal of the buildings or structures and all clean-up operations within a reasonable period not to exceed 60 days from mailing of notice of acceptance of his offer. In the event the Purchaser fails to complete the removal and clean-up operations within 60 days, or by such extension thereof, as the Contracting Officer may approve, the Government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the Purchaser with the cost of removing the dwelling and cleaning up the site without crediting the Purchaser with the salvage value of the material or construction work removed.
7. *Officials Not to Benefit.* No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

8. *Assignment.* Neither this contract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U.S.C. 15.)
9. *Covenant Against Contingent Fees.* The Purchaser warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract at its option to recover from the Purchaser the amount of such commission, percentage, brokerage, or contingent fee in addition to the consideration herewith set forth. This warranty shall not apply to commissions payable by the Purchaser upon the contract secured or made through bona fide established commercial agencies maintained by the Purchaser for the purpose of doing business. "Bona fide established commercial agencies" has been construed to include licensed real estate brokers engaged in the business generally.
10. *Non-Discrimination.* There shall be no discrimination by reason of race, creed, color, national origin, or political affiliation, against any employee or applicant for employment qualified by training and experience, for work in connection with this contract.
11. *Definitions.* The term "Contracting Officer" shall mean the person signing this contract for the Government or his duly authorized successor in office and any person authorized to act for him as his duly authorized representative.
12. Notice of acceptance of offer shall be made by depositing in the United States mails a notice addressed to the purchaser at the address designated in the offer.
13. No offer may be withdrawn without the consent of the Public Housing Administration for a period

of 30 days after the date of the first advertisement.

14. If a Government Agency has requested in its offer time beyond the end of said period to acquire funds to purchase or obtain transfer of funds and the Public Housing Administration has determined that additional time shall be allowed, the date of the settlement shall be so extended.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA AND LEE ARENAS, APPEL-
LANTS

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SAL-
LEE, APPELLEES

AND

LEE ARENAS, APPELLANT

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SAL-
LEE, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLANT

PERRY W. MORTON,
Assistant Attorney General.

LAUGHLIN E. WATERS,
*United States Attorney,
Los Angeles, California.*

JOHN F. COTTER,
EDMUND B. CLARK,
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Washington 25, D. C.*

FILED

JAN 27 1955

**PAUL P. O'BRIEN,
CLERK**

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14555

UNITED STATES OF AMERICA AND LEE ARENAS, APPEL-
LANTS

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SAL-
LEE, APPELLEES

AND

LEE ARENAS, APPELLANT

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SAL-
LEE, APPELLEES

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The jurisdiction of the district court rested on the Act of August 15, 1894, 28 Stat. 305, 25 U.S.C. 345. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

(1)

QUESTIONS PRESENTED

1. Whether interest on attorneys' fees may be imposed against a fund in court which represents restricted Indian land.

2. Whether an attorney's lien on the proceeds of land recovered through his efforts in one suit includes expenses incurred in another suit.

STATEMENT

This is an appeal from those parts of a judgment ordering that interest on attorneys' fees and certain costs incurred by one of the attorneys, appellee herein, be paid from the proceeds of the sale of restricted Indian land which had been allotted to the Indians through the efforts of the attorneys. The facts are undisputed and may be summarized as follows:

In a suit brought against the United States in the United States District Court for the Southern District of California, under the Act of August 15, 1894, 28 Stat. 305, as amended, February 6, 1901, 31 Stat. 760, 25 U.S.C. 345,¹ by Lee Arenas it was held that he was entitled to allotments for himself and his deceased wife, Guadaloupe, of lands in the Palm Springs Reservation.² Thereafter trust patents were issued to Lee and the heirs of Guadaloupe. Appellee was one of three attorneys for Lee in that case. He also represented Lee in a subsequent suit against the United States and Lee's adopted daughter, Eleuteria, to establish his exclusive right to both allotments. But it was held that Eleuteria was entitled to one-half of Guadaloupe's allotment. See

¹ The 1901 amendment provided that such suits be brought against the United States.

² The judgment was affirmed by this Court (158 F. 2d 730) following a decision of the Supreme Court (322 U.S. 419).

197 F. 2d 418. Thereafter, this Court held, contrary to the Government's position, that as an incident of its jurisdiction under the 1894 Act as amended, the trial court could award fees to the attorneys of Lee Arenas for obtaining the allotments. *Arenas v. Preston*, 181 F. 2d 62 (1950). On April 6, 1951, the district court fixed a fee of \$90,000, plus \$258.67 advanced by the attorneys as costs. The judgment also provided that payment would be secured by an equitable lien upon the lands allotted to Lee and Eleuteria. It further provided that upon failure to pay within six months the lands would be sold to pay the awards and after deducting the cost of the sale any excess should be paid to the United States in trust for Lee and Eleuteria. But the judgment made no provision for interest on the \$90,-258.67. This Court affirmed. *United States v. Preston*, 202 F. 2d 740 (1953).

That brings us to the instant litigation. Pursuant to a motion by appellee (R. 9), the district court on August 10, 1953, ordered the sale of the property and provided that attorneys' fees, with interest from April 6, 1951, the date of its judgment fixing the fee, should be paid from the proceeds (R. 8-14). The Government objected to the provision for the payment of interest (R. 15-18). The court amended the order to provide that interest should run from October 6, 1951, the end of the six-month period allowed for the sale (R. 18-19). A commission to sell the land was appointed (R. 21-22). However, Lee and Eleuteria arranged privately to sell some of the land for \$122,114 (R. 65), which was deposited in court, and, pursuant to stipulation of the parties, the lien was transferred from the land to the fund (R. 25-45).

On July 9, 1954, appellee petitioned for payment from the fund of his share of the \$90,258.67, with interest from October 6, 1951, and, in addition, \$468 advanced to Lee in connection with his unsuccessful litigation with Eleuteria (R. 46-53). The district court found that the amount due on the judgment for attorneys' fees and costs was \$90,258.67, plus interest thereon from October 6, 1951, at seven percent, amounting to \$17,725.80 (Fdg. 2, R. 63). Appellee's share of the principal and interest is slightly more than one-third.³ It also found that appellee was entitled to \$468.19, plus interest, or \$552.40, for expenses advanced by him in the litigation between Lee and Eleuteria Brown Arenas (Fdg. 4, R. 64). The district court made conclusions of law consistent with its findings (R. 70-72) and on August 21, 1954, entered judgment accordingly (R. 73-78). This appeal followed (R. 79-80).

ARGUMENT

I

Interest on Attorneys' Fees May Not Be Imposed Against a Fund in Court Which Represents Restricted Indian Land

The land against which the lien for attorneys' fees was imposed was restricted Indian land held by the United States in trust for Lee and Eleuteria Brown Arenas. The proceeds of the sale of that land are now held by the court and, of course, are subject to the same restrictions as the land. *Sunderland v. United States*, 266 U.S. 226 (1924); *Ward v. United States*, 139 F. 2d

³ The other two attorneys have assigned their shares and some of the assignees have petitioned for distribution of the principal amount. But as a practical matter the disposition of the total interest of \$17,725.80 will be settled by this appeal.

79, 82 (C.A. 10, 1943). This was recognized by the district court in the provision of its judgment (affirmed in *United States v. Preston*, 202 F. 2d 740) that any excess from the sale should be paid the United States in trust for the Indians. It is therefore clear that the United States has an interest in the fund in court and a suit involving such a fund is a suit against the United States. *Minnesota v. United States*, 305 U.S. 382 (1939); *United States v. Hellard*, 322 U.S. 363 (1944). Consequently only to the extent of the Government's consent may the fund be subjected to adverse claims. And consent to suit against the United States does not include consent to the imposition of interest, unless the consent statute expressly so states. *United States v. Hotel Co.*, 329 U.S. 585 (1947); *United States v. N. Y. Rayon Co.*, 329 U.S. 654 (1947); *United States v. Goltra*, 312 U.S. 203, 210-211 (1941); *Boston Sand Co. v. United States*, 278 U.S. 41 (1928).

This Court has already held that the Act of August 15, 1894, 20 Stat. 305, 25 U.S.C. 345, consenting to suits by Indians to establish their rights to allotments necessarily included consent to subject the trust allotments to the payment of fees to attorneys who prosecuted the claims. But it does not follow that the allotments (now represented by the fund in court) may be subjected to the payment of interest. The 1894 Act—and it is the only legislation upon which the claim can be premised—does not authorize the imposition of interest and therefore it may not be allowed. *Anglin & Stevenson v. United States*, 160 F. 2d 670 (C.A. 10, 1947), certiorari denied 331 U.S. 834. In that case attorneys had been employed on behalf of Indians to establish heirship to restricted Indian lands. After successfully establish-

ing the claims the attorneys were awarded fees for their services to be paid from the distributive shares of the claimants. The court of appeals affirmed the denial of interest on the awards on the ground that its allowance would constitute an award of interest against the United States. As the court said at p. 673:

* * * consent of the United States to be bound by a judgment does not amount to an express consent that such judgment shall bear interest. When the judgment was entered and became final, the equitable jurisdiction of the [trial] court was exhausted. The imposition of interest on the judgment was not a part of the equitable process to which the Government expressly consented to be bound.

That case—and it is the only one dealing with the imposition of interest on restricted funds—is indistinguishable in substance from the instant case. For as has been shown (*supra*, pp. 4-5) the trust status of the property was not changed because it was converted from land to a fund in court. The court's power to disburse the fund was limited to payment of the amount awarded to the attorneys by the judgment of April 6, 1951, which has been affirmed by this Court. And since nothing in the 1894 Act, as amended, consents to the imposition of interest it is submitted that the allowance thereof was erroneous.

II

An Attorneys' Lien on the Proceeds of Land Recovered Through His Efforts in One Suit Does Not Include Claims For Expenses Incurred in Another Suit.

The only basis for the payment of fees and costs from the fund in court is that the land now represented by

the fund was recovered through the efforts of the attorneys and that the value of the services and the costs incurred are liens against the fund (see *Arenas v. Preston*, 181 F. 2d 62). This type of attorneys' lien is clearly a charging lien. See *Webster v. Sweat*, 65 F. 2d 109, 110 (C.A. 5, 1933); 7 C.J.S., Attorney and Client, sec. 211. Such a lien "never extends beyond the costs and fees due the attorney in the suit in which the judgment is recovered". *Everett, Clark & Benedict v. Alpha Portland C. Co.*, 225 Fed. 931, 937 (C.A. 2, 1915); see also 7 C.J.S., Attorney and Client, sec. 213 and cases there cited. Consequently there is no basis for allowing payment from this fund of the \$468 advanced by appellee in a litigation having nothing to do with recovering the property now represented by the fund in court.

Moreover one-fourth of this fund is held in trust for Eleuteria Brown Arenas. The \$468 was advanced by appellee in a suit brought against Eleuteria. And it is evident that she may not be charged—even to the extent of one-fourth—with the expenses of an unsuccessful suit against her.

It is therefore submitted that the allowance of this award was also erroneous.

CONCLUSION

For the foregoing reasons it is submitted that the parts of the judgment appealed from should be reversed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.

LAUGHLIN E. WATERS,
*United States Attorney,
Los Angeles, California.*

JOHN F. COTTER,
EDMUND B. CLARK,
*Attorneys, Department of Justice,
Washington, D. C.*

JANUARY, 1955.

No. 14585

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D.
SALLES,

Appellees

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D.
SALLES,

Appellees.

Appeal From the United States District Court for the
Southern District of California Central Division.

Opening Brief of Appellant, Lee Arenas.

MR. DAVID BARTT,

453 South Spring Street,
Los Angeles 13, California,

Attorney for Appellant Lee Arenas.

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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No. 14555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D.
SALLEE,

Appellees.

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D.
SALLEE,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

Opening Brief of Appellant, Lee Arenas.

Opinion Below.

The Trial Court wrote no opinion.

Jurisdiction.

The appeal herein of Lee Arenas [Tr. 83] is from a
portion of a final supplemental judgment and decree

entered August 23, 1954 [Tr. 73-78] awarding appellees, who were former attorneys for Lee Arenas, interest upon the principal sum previously awarded to them as attorney's fees and costs (without interest) by a final judgment and supplemental decree entered April 6, 1951 [Tr. 3-8], which prior judgment was affirmed upon appeal by this court on March 16, 1953 (*United States v. Preston, et al.*, No. 13103, 202 F. 2d 740) and became final 90 days thereafter (28 U. S. C. A., Sec. 2101). This appeal is also from a portion of the same supplemental judgment and decree which allowed and ordered paid to appellee, Preston, the sum of \$468.19 together with interest to cover costs and expenses he had advanced and paid as attorney for appellant, Lee Arenas, in an entirely different action brought against the United States and Eleuteria Brown Arenas in the lower court as Civil No. 12356-Y and affirmed on appeal by this court (*Arenas v. U. S.*, 197 F. 2d 418).

The jurisdiction of the district court was invoked under 25 U. S. C., Sec. 345. The jurisdiction of this court is invoked under 28 U. S. C. A., Sec. 1291.

Statement of the Case.

Appellees, as counsel for appellant, Lee Arenas, established his right to certain allotments in severalty to lands within the Palm Spring Indian Reservation in his own right and as heir at law of his deceased wife, Guadalupe (*United States v. Arenas*, 158 F. 2d 730) and thereafter, obtained in the district court the judgment and supple-

mental decree [Tr. 3-8] which became final 90 days after affirmance by this court on March 16, 1953 (*United States v. Preston, et al.*, 202 F. 2d 740). Neither such judgment nor the mandate of this court contained any provision for interest upon the principal sum awarded to appellees by the judgment and affixed as a lien upon the allotted lands of appellant, Lee Arenas. Thereafter, the district court made orders for judicial sale of the trust patented Indian lands [Tr. 8-14; 18-19 and 20-25].

Confronted with such orders, appellant, Lee Arenas, procured cash purchasers for some of his allotted lands and, with the consent and approval of the Secretary of the Interior and by stipulations of the interested parties and orders of the district court entered April 30, 1954 [Tr. 25-44], was permitted to consummate such sales and to deposit the entire proceeds thereof, less certain charges, into the registry of the lower court with the liens formerly imposed upon the lands sold being transferred to and imposed upon the deposited funds.

Because such orders for judicial sale included provisions for interest [Tr. 12-23], private sales were made in an amount sufficient to cover such interest together with interest upon such interest pending appeal to this court and the sum of \$122,104.00 was paid into the registry [Tr. 49, Par. VI]. Coincident therewith, the previous orders for judicial sale were vacated and set aside by a stipulated order of the lower court [Tr. 44-45].

Thereafter, upon petition [Tr. 46-53] and over objection of the United States for itself and for appellant, Lee

Arenas [Tr. 57-61], the district court awarded interest at 7% per annum from October 6, 1951 upon the fee and costs of \$90,258.67 allowed to appellees in the final judgment entered April 6, 1951 and ordered such interest paid from the deposited proceeds of the sale of the Lee Arenas allotted lands [Tr. 73-78].

In the same judgment and pursuant to the same petition, the district court awarded to appellee Preston alleged reimbursement of costs in the sum of \$468.19 which said appellee had advanced and paid as attorney for Lee Arenas in the separate action in which Lee Arenas unsuccessfully challenged the administrative decision of the Secretary of the Interior that Eleuteria Brown Arenas was the adopted daughter of Lee and Guadalupe and, as such, entitled to share one-half of Guadalupe's allotment as her heir at law and the lower court further ordered that such sum together with interest thereon at 7% per annum from January 1, 1952 be paid to Preston from the deposited proceeds of the sale of the Lee Arenas allotted lands.

Thereafter, both the United States [Tr. 79] and Lee Arenas appealed [Tr. 83].

Questions Involved.

1. Was it error for the lower court to award and direct payment of the proceeds of sales of restricted Indian lands as interest?
2. Was it error for the lower court to award and direct payment of such funds for reimbursement of advances made for Lee Arenas in an entirely separate and different litigation?

ARGUMENT.

I.

The District Court Erred in Awarding Interest and Directing Payment Thereof Out of the Proceeds of the Sale of Restricted Indian Lands.

The judgment of April 6, 1951 [Tr. 3] and the judgment from which this appeal is taken [Tr. 73] were judgments against the United States of America as custodian of restricted funds which were the proceeds of sales of restricted, allotted, Indian lands, and such funds were clothed with immunity of the sovereign from the exaction of interest. Therefore, it was error for the lower court to award and direct payment from such funds as interest. This court has established as the law of this case the fact that the United States was a necessary party defendant to appellees' claims and that their judgments were against it.

Arenas v. Preston, 181 F. 2d 62, 68-69;

United States v. Preston, 181 F. 2d 69, 70;

Cf. United States v. Hellard, 322 U. S. 363, 366.

When the judgment is against the United States or against funds which it holds in trust in its sovereign capacity or in which it has an interest, interest can not be awarded against it or from such funds without its express consent.

Huntley v. South Oregon Sales (C. A. 9, 1939), 104 F. 2d 153, 154;

Bramwell v. U. S. F. & G. (C. A. 9, 1924), 299 Fed. 705, 706, *affd.* 269 U. S. 483.

The case of *Anglin & Stevenson v. United States* (C. A. 10, 1947), 160 F. 2d 670, *cert. den.* 331 U. S. 834, is almost on all fours with this case and is controlling here.

There, as here, there were a long series of appeals. There, as here, there was a supplemental decree for attorney fees. There, as here, the restricted Indian funds were paid into the registry of the court. There, as here, the original judgment for attorney fees contained *no provision* for interest upon the principal sum. There, as here, the appellate court had decided that, since the United States had consented to be sued, or invoked the jurisdiction of the district court, that court had "full equity jurisdiction" (160 F. 2d 670, 672-181 F. 2d 62, 67). The only difference between the two cases is that the district court in the Oklahoma case had decided that interest could not be awarded and the lower court from whose judgment this appeal is taken has decided that interest can and should be awarded. We believe the following conclusions of the Tenth Circuit are unanswerable:

"But, consent of the United States to be bound by a judgment does not amount to an express consent that such judgment shall bear interest. When the judgment was entered and became final, the equitable jurisdiction of the court was exhausted. The imposition of interest on the judgment was not a part of the equitable process to which the Government expressly consented to be bound. The final judgment was against the United States as custodian of restricted funds. It held these funds in trust for the Indian heirs in its sovereign capacity, and they thus became clothed with immunity from the exaction of interest."

Anglin & Stevenson v. U. S., 160 F. 2d 670, 673.

Aside from the fact that the judgment appealed from is against it, the United States is necessarily and adversely affected by such judgment by reason of its obligation as trustee. By the Mission Indian Act (Act of June 12,

1891, 26 Stat. 712, Sec. 5, quoted in 158 F. 2d 730, 734) the United States engaged to allot and convey these lands in severalty, free of encumbrances, to appellant, Lee Arenas upon the expiration of the trust period. To compel these sales and then use the proceeds to pay appellees, obligates the United States in performance of such trust to re-pay such amounts in order to fully perform such trust obligation. Hence, any increase in the amounts paid for interest becomes an increase in the ultimate obligation of the United States as trustee.

United States v. Rickert, 188 U. S. 432, 438;

Nathanson v. N. L. R. B., 344 U. S. 25, 28.

II.

The District Court Erred in Reimbursing Preston Out of These Restricted Funds in Payment for His Advances for Lee Arenas in an Entirely Separate Action.

United States v. Preston, 202 F. 2d 740, 742.

In fact, such advance by Preston merely created a personal, unsecured indebtedness from Lee Arenas to him which could not be enforced against Lee's restricted Indian property.

25 U. S. C. A., Sec. 410.

Conclusion.

Accordingly, it is submitted that the judgment of the district court should be reversed in respect to the matters appealed from.

Respectfully submitted,

IRL DAVIS BRETT,

Attorney for Appellant Lee Arenas.

No. 14555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D.
SALLEE,

Appellees.

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D.
SALLEE,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEES' BRIEF.

JOHN W. PRESTON,

OLIVER O. CLARK,

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I.

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No. 14555
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,
Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D.
SALLEE,

Appellees.

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D.
SALLEE,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEES' BRIEF.

Opinion Below.

The trial court wrote no opinion.

Jurisdiction.

The District Court had jurisdiction of this cause under 25 U. S. C. A., Section 345 (28 Stat. 286-305, as amended).

This Court has jurisdiction on appeal under 28 U. S. C. A., Section 1291.

Statement.

This case has been before this Court several times since the District Court, in 1945, determined that Lee Arenas was entitled to an allotment in severalty of the lands selected by him in 1927. (*Arenas v. United States*, 60 Fed. Supp. 411.) That judgment was affirmed by this Court as to the allotments of Lee Arenas and his deceased wife, Guadalupe Arenas. (*United States v. Arenas*, 158 F. 2d 730 (1947), cert. den. 331 U. S. 842, 67 S. Ct. 1532.) Thereafter Arenas' attorneys (appellees herein) filed their petition for allowance of attorneys' fees, and for an equitable lien securing same, and the District Court awarded them fees on a percentage basis and impressed an equitable lien upon Arenas' allotted lands to secure payment of the fees and expenses allowed. The United States and Arenas appealed, and this Court affirmed the right to fees and expenses and to an equitable lien to secure same, but reversed "with instructions to determine the sum of money for which amount the lien against the allotted property is to be impressed." (*Arenas v. Preston*, 181 F. 2d 62, 67.) On remand, the District Court awarded judgment for fees and expenses in specified amounts in accordance with this Court's instructions, and the United States and Arenas again appealed. This Court affirmed said judgment (1953) in all respects as to the award of fees, expenses and lien against Lee Arenas. (*United States v. Preston*, 202 F. 2d 740, 743.) (The judgment for fees and expenses is included in the Record at pages 3-8.)

Thereafter appellees Preston, Clark and Sallee petitioned the District Court for an order of sale of Lee Arenas' allotted lands, or so much thereof as might be necessary, to satisfy the judgment for fees and expenses. On August 6, 1953, the District Court signed and on August 10, 1953, entered an order of sale, as prayed for [R. 8-14], providing, *inter alia*,

“* * * that the proceeds of the sale * * * be distributed as follows, to wit: (1) to the costs and expenses of sale, including such amount as may be awarded as compensation to the commissioner in making said sale; (2) to the petitioners John W. Preston, Oliver O. Clark and David D. Sallee, the amount of Ninety Thousand Two Hundred Fifty-eight & 67/100 Dollars (\$90,258.67), together with lawful interest thereon at the rate of 7% per annum from April 6, 1951; and (3) the balance to the United States of America in trust for plaintiff (Arenas).” [R. 12.]

On August 18, 1953, the United States moved the Court to delete from said order of sale the phrase “together with lawful interest thereon at the rate of 7% per annum from April 6, 1951,” on the same grounds now urged in its brief. [R. 15-18.] Said motion was thereafter presented, argued and submitted, and on October 26, 1953, the District Court signed and on November 10, 1953, docketed and entered its judgment on said motion amending its order of sale above set forth to read as follows:

“* * * it appearing to this court that the judgment and supplemental decree entered in this cause

* * * should bear interest at the rate of 7% per annum from a date six months subsequent to the entry of said Supplemental Judgment and Decree, it is

“Ordered that the paragraph of said Order for Sale of Real Property to Satisfy Supplemental Judgment and Decree beginning at line 13 and ending at line 21, page 4, thereof be and the same is hereby amended to read as follows:

“IT IS FURTHER ORDERED that the proceeds of the sale of said lands, or sales, be distributed as follows, to wit: (1) to the costs and expenses of sale, including such amount as may be awarded as compensation to the commissioner in making said sale; (2) to the petitioners John W. Preston, Oliver O. Clark and David D. Sallee, the amount of Ninety Thousand Two Hundred Fifty-eight and 67/100 Dollars (\$90,258.67), together with lawful interest thereon at the rate of seven per cent (7%) per annum from October 6, 1951; and (3) the balance to the United States of America in trust for the plaintiff.

“Done in open court October 26, 1953.” [R. 18-19.]

This was a final order and judgment and no appeal was taken therefrom by the United States, or by Lee Arenas, within sixty days from the date of the entry thereof, *or at all*.

Thereafter, on November 30, 1953, the Court ordered a readvertisement of sale of Arenas' property, and a distribution of the proceeds of sale in precisely the same language set forth in its order and judgment entered on November 10, 1953. [R. 20-25. See language, *id.*, p.

23.] No appeal was ever taken from said order of sale. At the request of the United States and Lee Arenas, judicial sale of Arenas' property was postponed several times. On April 30, 1954, upon stipulation of the United States, Lee Arenas, and these appellees, the Court made and entered an order giving Lee Arenas permission to sell, subject to the approval of the United States, enough of his land to satisfy the judgment for fees and expenses [R. 29-31], the proceeds of such sale, or sales, to be deposited in the registry of the court, and the lien of the judgment to be transferred from the lands sold to the proceeds of sale so deposited. (*Id.*) Thereafter, Lee Arenas, through his attorney, sold several parcels of his land, the United States approved said sales, and the proceeds, less escrow expenses, were deposited in the registry of the court. [R. 29-45.] The total proceeds of sales thus deposited amounted to the sum of \$122,114.00.

Thereafter appellee John W. Preston filed his petition for the distribution of the amount so deposited in the registry of the court, or so much thereof as would be necessary to satisfy the judgment for fees and expenses, together with 7% interest thereon from October 6, 1951, to John W. Preston, Oliver O. Clark and David D. Sallee [R. 46-53], and an order to show cause was issued thereon to appellants. In its return to said order to show cause the United States, for itself, Lee Arenas, and Richard Brown Arenas, stated *inter alia*:

"These defendants renew and reassert separately and severally their opposition to the award and allow-

ance of interest from and out of the proceeds of the sales from and after October 6, 1951 * * *.”

As will later more fully appear, this attempt to renew its opposition to the allowance of interest on the judgment for fees was and is abortive, since no appeal was ever taken from the final order and judgment of October 26, 1953, entered November 10, 1953.

The United States filed notice of appeal “from those portions of the judgment docketed and entered herein on August 23, 1954, awarding and allowing * * * interest from and after October 6, 1951” on the judgment for fees. [R. 79-80.] Lee Arenas also filed a similar notice of appeal. [R. 83-84.]

Contentions of Appellants.

Both of the appellants contend:

1. That the District Court was without jurisdiction and power to allow interest on the judgment for fees and expenses in this suit; and

2. That the District Court was without jurisdiction and power to order payment out of the funds of Lee Arenas on deposit in the registry of the court of the expenses incurred and paid by appellee John W. Preston at the request and on behalf of Lee Arenas in an action to determine whether or not Eleuteria Brown Arenas was entitled to share with Lee Arenas the lands allotted to his deceased wife, Guadalupe Arenas.

The foregoing contentions are without merit under the facts and law of this case.

Summary of Argument.

1. The District Court had equitable jurisdiction under Title 25, U. S. C. A., Section 345 to award interest on the judgment for attorneys' fees and expenses of suit. It also had power under its general equity jurisdiction to award interest on said judgment.

2. The District Court had equitable jurisdiction to order payment, out of the funds of Lee Arenas on deposit in the registry of the court, of the expenses authorized by him in the suit entitled "Lee Arenas v. Eleuteria Brown Arenas," in the District Court, to determine whether Eleuteria Brown Arenas was entitled to a share of the lands allotted to the deceased wife of Lee Arenas.

3. The order of the District Court awarding interest on the judgment for attorneys' fees and expenses of suit, which was entered on November 10, 1953, was not appealed from and is final, and said order is *res judicata* of the right of appellees to interest on said judgment.

ARGUMENT.

I.

The District Court Had Equitable Jurisdiction Under Title 25 U. S. C. A., Section 345 to Award Interest on the Judgment for Attorneys' Fees and Expenses of Suit. It Also Had the Power Under Its General Equity Jurisdiction to Award Interest on Said Judgment.

In substance, the United States and Lee Arenas contend that the District Court did not have jurisdiction to allow interest on the judgment for attorneys' fees and expenses of suit. They admit that "This Court has already held that the Act of August 15, 1894, 20 Stat. 305, 25 U. S. C. 345, consenting to suits by Indians to establish their rights to allotments necessarily included consent to subject the trust allotments to the payment of fees to attorneys who prosecuted the claims." (U. S. Br. p. 5.) In effect, they then assert that the equitable jurisdiction of the District Court ended at the point of allowance of fees. This is not the law.

The jurisdictional act (25 U. S. C. A., Sec. 345) under which this suit was brought and prosecuted conferred equity jurisdiction upon the District Court for every purpose necessary or incidental to the determination of an Indian's right to an allotment of land in severalty. This Court has so held. (*Arenas v. Preston*, 181 F. 2d 62, 66.) In that decision this Court said:

"Appellant United States in the instant case makes practically the same argument as it made in the Equitable case. That is, that the court cannot apply the general rule, to wit: That a court of equity may settle incidental questions as well as fundamental questions, because the applicable statutes in this case

do not specifically authorize it. It is also argued that as to our case the applicable statute (*i. e.*, 25 U. S. C. A., sec. 345) does not authorize the impression of a lien upon the property, because its foreclosure would have the effect of disposing of a part of the property. But the Supreme Court rejected the argument by saying that it was intended that the restrictions on the allotted land, *which apply as well to produce from the land*, should afford protection to the allottee, rather than to restrict courts of equity from giving such protection. (Emphasis by the Court.) * * *

“When the United States authorized the Indian to make the United States an adverse party in its own courts, it did so knowing that the Indian by himself was incapable of taking advantage of the privilege and that attorney fees and other expenses would be the unavoidable concomitant. It also knew that the Indian litigant, with few exceptions, was without the means to meet the necessary expenses. It seems to us that Congress could not have intended to commit the subject to its court with any paralyzing limitation but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction.”

As we understand this Court’s opinion, *supra*, the jurisdictional statute (25 U. S. C. A., Sec. 345), although silent as to impressing a lien, granted all general equity jurisdiction to the District Court and thereunder it had power to award such lien and to foreclose it. If this may be done, then it logically follows that the court, in the exercise of its general equity jurisdiction, may also award interest on the judgment from the date of its entry.

This Court’s holding, *supra*, is in accord with the general rule that a court of equity whose jurisdiction has

been invoked for one purpose may determine all equities between the parties connected with the main subject of the suit, and equitable relief may thus be incidentally obtained even though the original bill would not lie for such relief alone.

30 C. J. S. 421, Sec. 68 of Equity, and many cases there cited;

Wenban Estate v. Hewlett, 193 Cal. 675;

Bettencourt v. Bank of Italy, 216 Cal. 174;

Colorado Power Co. v. Pac. Gas & Elec. Co., 218 Cal. 559;

Hendrickson v. Bertelson, 1 Cal. 2d 430;

Sears v. Rule, 27 Cal. 2d 131.

Dozens of California and other State cases are to like effect.

In its original judgment for attorneys' fees and expenses of suit the District Court provided that Lee Arenas should have a period of six months within which to pay the amount thereof. No payment was made within said period. Instead, Arenas and the United States delayed payment by appealing the judgment. Under such circumstances, other related principles of law and equity also apply.

It is well settled that, in equity, interest may be allowed on a claim as a means of compensating a creditor for loss of the use of his money.

Miller v. Robertson, 266 U. S. 243, 45 S. Ct. 73;

United States v. United Drill etc. Corp., 183 F. 2d 998;

Wicker v. Hoppock, 6 Wall. 94, 99, 18 L. Ed. 752;

Young v. Godbe, 82 U. S. 562, 21 L. Ed. 250;

Curtis v. Innerarity, 6 How. 146, 154, 12 L. Ed. 380;

Abell v. Anderson, 148 F. 2d 372, 375;

Spalding v. Mason, 161 U. S. 375, 396, 16 S. Ct. 392;

United L. & P. Co. v. Grand Rapids Tr. Co., 85 F. 2d 331, 338;

Seaboard Surety Co. v. Spear, 119 F. 2d 849, 852.

Many other cases are to like effect.

As stated in *Young v. Godbe*, 82 U. S. 562, and in *United States v. United Drill etc. Corp.*, 183 F. 2d 998:

“If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest for the delay in payment
* * *.

“If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account.”

In *Miller v. Robertson*, 266 U. S. 243, 45 S. Ct. 73, *supra*, the plaintiff sued Miller, as Alien Property Custodian; and White, as Treasurer of the United States, and certain others. Thus, the United States was a party, and defended by its Attorney General. In its discussion of the question of interest by way of damages for delay in payment of the obligation the Supreme Court said (45 S. Ct. 73 at p. 78):

“While the suit, as held in *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591, 603, 44 St. Ct. 209, 68 L. Ed. 465 (affirming 53 App. D. C. 266, 289 F. 924), is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign im-

munity from liability for interest (citing cases) does not apply.

“Compensation is a fundamental principle of damages whether the action is in contract or in tort. *Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L. Ed. 752. One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Curtis v. Innerarity*, 6 How. 146, 154, 12 L. Ed. 380. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. *Spalding v. Mason*, 161 U. S. 375, 396, 16 S. Ct. 592, 40 L. Ed. 738.”

In the case at bar the suit is against the United States, but the claim for fees is not against it; the claim is against Lee Arenas, and only Arenas is liable to pay it out of property recovered for him by appellees. This claim has been opposed by the United States at every step of the proceeding, and it is in no position to set up equities; it now resorts to a technicality, which, as appears from the authorities, *supra*, has no application here.

Other cases hold that the District Court may allow interest on a claim as an item of incidental damages for failure to pay the claim promptly when due.

Ferguson v. Union Nat. Bank, 126 F. 2d 753, 759;
Curtis v. Innerarity, 6 How. 154, 12 L. Ed. 380;
Spalding v. Mason, 161 U. S. 375, 396, 15 S. Ct. 592;

R. R. Credit Corp. v. Hawkins, 80 F. 2d 818, 825-826;

Ticonic Nat. Bank v. Sprague, 303 U. S. 407, 408;
Calif. Civ. Code, Sec. 2905.

It may also be noted in this connection that federal appellate courts have discretion whether or not to allow damages or interest in cases of affirmance upon the theory that interest for the time an appeal is pending is damages for delay.

Continental Oil Co. v. United States, 184 F. 2d 802, 821-822 (9 Cir.);

Blair v. Dunham, 139 F. 2d 260, 261;

Austrian v. Williams, 103 Fed. Supp 64;

Schill v. Cochran, 107 U. S. 625, 27 L. Ed. 543.

There is thus abundant authority to sustain the allowance of interest on the judgment of the District Court.

The Anglin & Stevenson Case Is Distinguishable From the Case at Bar.

In view of the authorities above cited and discussed it is clear that the decision in *Anglin & Stevenson v. United States*, 160 F. 2d 670, is not in point. First, the United States was not a party to the heirship proceedings filed in Oklahoma State district courts by various groups of Indians claiming to be the heirs of Jackson Barnett, a full blood Creek Indian; but the United States intervened and caused a transfer of said heirship proceedings to the Federal District Court. Thus the only jurisdiction acquired by the Federal District Court over the United States arose out of the express terms of its voluntary consent as expressed in its petition of intervention. All of the property of Barnett, consisting of land and a large amount of money, was and for many years had been in the control of the Government, and none thereof was recovered or

preserved by the attorneys for the estate of Barnett. It may also be noted that the heirship proceeding was one at law and not in equity, whereas the case at bar is equitable.

In the *Anglin & Stevenson* case, the District Court, sitting in equity for the purpose of allowing fees, and acting within the scope of its discretion, denied interest on the judgment for attorneys' fees. In the case at bar the District Court, acting within its discretion, allowed interest on the judgment for attorneys' fees. In other words, in the *Anglin & Stevenson* case the District Court obviously believed that the delay in payment of the judgment did not, in equity, justify adding interest thereto. In the case at bar the District Court felt that the delay in payment of judgment for fees warranted, in equity, the imposition of interest.

As already noted, it is well settled that, in equity, the court may allow interest on a judgment by way of compensation or of damages for delay in the payment thereof.

Miller v. Robertson, 266 U. S. 243, 45 S. Ct. 73;

United States v. United Drill Corp., 183 F. 2d 998;

Wicker v. Hoppock, 6 Wall. 94, 99, 18 L. Ed. 752;

Young v. Godbe, 82 U. S. 562, 21 L. Ed. 250;

Curtis v. Innerarity, 6 How. 146, 154, 12 L. Ed. 380;

Abell v. Anderson, 148 F. 2d 372, 379;

United L. & P. Co. v. Grand Rapids, etc. Co., 85 F. 2d 311, 338;

Spalding v. Mason, 161 U. S. 375, 396, 16 S. Ct. 392;

Seaboard Surety Co. v. Spear, 119 F. 2d 948, 952.

See other cases, *supra*.

It should also be observed that in the *Anglin & Stevenson* case, on appeal, the litigants were trying to force their claim for interest, which could not be done because the court below had exercised its discretion and had denied the claim. This is the distinction between the two cases.

II.

The District Court Had Equitable Jurisdiction to Order Payment, Out of the Funds of Lee Arenas on Deposit in the Registry of the Court, of the Expenses Authorized by Him in the Suit Entitled "*Lee Arenas v. Eleuteria Brown Arenas*," in the District Court, to Determine Whether Eleuteria Brown Arenas Was Entitled to a Share of the Lands Allotted to the Deceased Wife of Lee Arenas.

The judgment in *Lee Arenas v. United States*; 60 Fed. Supp. 411, adjudged that Lee Arenas was entitled to an allotment on his own account, and to the allotment of his deceased wife Guadalupe Arenas, and also to the allotments of his deceased father and brother. On appeal, this Court affirmed the judgment as to the allotments to Lee Arenas and Guadalupe Arenas, but reversed as to the allotments of his father and brother. The judgment, as affirmed by this Court, therefore awarded to Lee Arenas his own allotment and the allotment of his deceased wife Guadalupe Arenas. Thereafter the United States determined, under 25 U. S. C. A., Section 372, that Eleuteria Brown Arenas was the adopted daughter (under tribal custom) of Lee and Guadalupe Arenas. In this situation Lee Arenas requested appellees, as his attorneys, to file an action in the District Court for an adjudication that, by virtue of the judgment in the allotment proceed-

ing, he was entitled to all of the lands allotted to his deceased wife. The action was filed and tried, and the trial court held that the determination of the heirs of Guadalupe Arenas had and made under 25 U. S. C. A., Section 372 was *res judicata* and binding upon Lee Arenas, notwithstanding the judgment of the District Court (60 Fed. Supp. 411) as affirmed by this Court. (158 F. 2d 730.) In the preparation, trial and appeal of the action brought by Lee Arenas v. Eleuteria Brown Arenas, appellee John W. Preston paid out of his funds, as expenses of suit, the total amount of \$468.19.

The District Court ordered payment to appellee John W. Preston of said amount of \$468.19 out of the funds of Lee Arenas on deposit in the registry of the court, and appellants allege this was error.

The facts stated, *supra*, show that the amount of \$468.19 in question was expended in a proper effort to make fully effective the judgment awarding the allotment of Guadalupe Arenas to Lee Arenas; and in that respect the action against Eleuteria Brown Arenas was, in reality, a part of the allotment proceeding and was integrated therewith.

It should also be noted that the funds in the registry of the court were under its control and it had power, under its equity jurisdiction, to require Lee Arenas to do equity. The necessary parties, subject matter, and property were before the Court, and no reason existed why it should not order reimbursement of expenses authorized by Lee Arenas to preserve intact his judicial allotment.

III.

The Order of the District Court Awarding Interest on the Judgment for Attorneys' Fees and Expenses of Suit, Which Was Entered on November 10, 1953, Was Not Appealed From and Is Final, and Said Order Is Res Judicata of the Right of Appellees to Interest on Said Judgment.

The judgment awarding attorneys' fees contained a provision retaining jurisdiction over the action and the parties thereto and the subject matter thereof for stated purposes and, specifically, "in order to fully effectuate and enforce the judgment and supplemental decree herein in accordance with the equitable jurisdiction, practice and procedure of this court." [R. 7-8.] This Court affirmed. (*United States v. Preston*, 181 F. 2d 740.) On remand, the District Court made and entered its order, on November 10, 1953, awarding interest on the judgment for fees. This judgment was never appealed from. The present appeal is from an order disbursing the amount due appellees among them as their interests therein appear; it is not an order *awarding* interest on the judgment, but it is an order to *disburse* the amount of principal and interest due on the judgment to appellees.

The order of November 10, 1953, being final and not appealed from, is *res judicata* of appellees' right to interest on the judgment; and appellants are estopped to question the validity of said order.

Partmar Corp. v. Paramount Pictures, 347 U. S. 89, 98, 74 S. Ct. 414;

United States v. Munsingwear, Inc., 340 U. S. 36, 71 S. Ct. 104;

C. I. R. v. Sunnen, 333 U. S. 591, 68 S. Ct. 715;

So. Pac. Co. v. United States, 168 U. S. 1, 18 S. Ct. 18, 27.

Dozens of cases, to the same effect, could be cited.

In *Southern Pacific Co. v. United States*, 18 S. Ct. 18, *supra*, the Supreme Court said:

“The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies * * *.”

The United States, by its motion to delete from the order of sale the phrase “together with lawful interest thereon at the rate of 7% per annum from April 6, 1951,” put squarely in issue the right of the appellees to interest and also the power of the District Court to award interest on the judgment, and this more clearly appears from the Points and Authorities attached to the motion. [See R. 15-18.] The order entered on the motion of the United States amended the order of sale in one respect only, *i. e.*, interest should run from October 6, 1951, instead of from April 6, 1951. In all other respects the motion to delete was denied.

There was and is complete identity of parties, subject matter and issues involved in the Government’s motion to delete the phrase allowing interest and in its present appeal from the order of disbursement. Therefore, appellants are estopped to question the order allowing interest.

A. The Payment Into the Registry of Court of Proceeds of Sales of a Portion of Arenas' Lands Was an Offer to Redeem and a Redemption of All His Lands From Lien of Judgment.

There is still another reason why appellants are estopped to question the validity of the order allowing interest on the judgment for fees. Following entry of the order entered November 10, 1953 (which was not appealed from) both Lee Arenas and the United States requested that appellees agree that Lee Arenas be permitted to sell, at private sale, sufficient of his lands to satisfy the judgment with interest. An order was made, based on that stipulation. [R. 35-38.] Thereafter Lee Arenas, by his then attorney, Irl D. Brett, made sales of several parcels of his allotted lands, and the proceeds, less escrow charges, amounting net to the total of \$122,114.00, were paid into the registry of the court, and the lien of the judgment, with interest at the rate of 7% per annum from October 6, 1951, was transferred from the lands to said funds thus deposited.

The legal effect of the stipulations and orders, made and entered after the order allowing interest on the judgment, was to transfer the lien of the judgment with interest to and upon the funds in the registry of the court, and that lien could be discharged only by paying the full amount of the principal and interest of the judgment.

Stated otherwise, the payment of the proceeds of the several sales of Arenas' lands, under the facts and circumstances stated, to satisfy the lien of the judgment was, in fact, a redemption of all of his lands from said lien. The money thus paid into court was more than an offer to redeem; it was, in fact, and by stipulation of the parties,

including the United States, a redemption from the lien of said judgment including the interest due thereon.

Calif. Civ. Code, Secs. 2905, 1504;

16 Cal. Jur. 347 *et seq.*, and cases cited;

Golden State etc. Co. v. Ward Motor Co., 185 Cal. 402;

Loughborough v. McNevin, 74 Cal. 250;

Leet v. Armbruster, 143 Cal. 663;

Nelson v. Yonge, 73 Cal. App. 704.

B. In Order to Redeem His Lands, Arenas Was Required to Pay Judgment and Also Damages for Delay.

There can be no extinguishment or discharge of a lien by partial performance of the act for which the lien is security. There must be full performance, including the payment of damages, if any, for delay.

Civ. Code, Secs. 2905, 2912;

16 Cal. Jur. 324, 347, Secs. 25, 46 of Liens;

San Pedro Lbr. Co. v. Reynolds, 121 Cal. 74;

Loughborough v. McNevin, 74 Cal. 250.

Section 2905 of the California Civil Code provides:

“Redemption from a lien is made by performing, or offering to perform, the act for the performance, of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay.”

Section 2912 of said Code provides:

“The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is divisible.”

The judgment for attorneys' fees was entered herein on April 6, 1951, and Arenas was given six months from said date within which to pay the judgment. More than three years have elapsed since the expiration of the stay period. A part of that period was consumed by the appeal from said judgment. Nearly two more years have been consumed by appellants in efforts to sell enough of Arenas' property to satisfy the judgment and by the current appeal. Apparently, both appellants have lost sight of the fact that this proceeding is one in equity, and that it would be grossly inequitable to permit them to delay payment of the judgment for many years without payment of damages (here interest) for the delay. The authorities cited under Point I, *ante*, abundantly support the proposition that interest may be allowed in equity under the circumstances of this case. Indeed, equity demands and California statutes provide for interest as damages for delay in this case.

Conclusion.

For the foregoing reasons, the orders appealed from should be affirmed.

Respectfully submitted,

JOHN W. PRESTON,

OLIVER O. CLARK,

DAVID D. SALLEE,

Attorneys and Appellees.

No. 14555

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA AND LEE ARENAS,
APPELLANTS

v.

JOHN W. PRESTON, OLIVER O. CLARK, AND
DAVID D. SALLEE, APPELLEES

AND

LEE ARENAS, APPELLANT

v.

JOHN W. PRESTON, OLIVER O. CLARK, AND
DAVID D. SALLEE, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

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(I)

In the United States Court of Appeals for the Ninth Circuit

No. 14555

UNITED STATES OF AMERICA AND LEE ARENAS,
APPELLANTS

v.

JOHN W. PRESTON, OLIVER O. CLARK, AND
DAVID D. SALLEE, APPELLEES

AND

LEE ARENAS, APPELLANT

v.

JOHN W. PRESTON, OLIVER O. CLARK, AND
DAVID D. SALLEE, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

ARGUMENT

The Order of November 10, 1953, is not *Res Judicata* on this Appeal.

In its opening brief the United States took the position that, as the Court of Appeals for the Tenth Circuit has already held, *Anglin v. Stevenson*, 160 F. 2d 670 (1947), certiorari denied, 331 U. S. 834, interest on

attorney's fees may not be imposed against a fund in court which represents restricted Indian land. Appellant contends (Br. 17-18) that the United States is estopped from making this contention because the unappealed order of November 10, 1953 (R. 18-19) which provided that the amount awarded as attorneys' fees should bear interest from October 6, 1951, is *res judicata* of that issue.

But neither that order nor the failure to appeal from it has any significance.¹ Since the suit involved restricted Indian land it was a suit against the United States and the court's power was limited to the extent of the consent of Congress. Congress had not permitted the imposition of interest. Therefore the order or judgment attempting to charge interest against the fund was more than erroneous—it was void. *United States v. U. S. Fidelity Co.*, 309 U. S. 506, 514 (1940); *United States v. N. Y. Rayon Co.*, 329 U. S. 654, 658-663 (1947); *United States v. Shaw*, 309 U. S. 495 (1940); *Tillson v. United States*, 100 U. S. 43 (1879); *Carr v. United States*, 98 U. S. 433 (1878). Consequently, whether or not appealed from, the order of November 10, 1953, was without effect. Thus, in the *U. S. Fidelity Co.* case the United States filed suit against a surety

¹ It is to be noted that the order of November 10, 1953, was an order that the restricted land be sold. Until the land was sold it could not be determined whether there would be any excess with which to pay interest. If not, that portion of the order imposing interest would be academic. In other words, the interest of the United States would not be affected until after the sale because unless there was an excess from which to pay interest it could not be said that interest was being imposed on a fund belonging to the United States. Consequently, it is at least doubtful whether the failure to appeal from that order could foreclose review of the interest issue even if there were jurisdiction.

to recover royalties under a mining lease. The defendant set up a judgment *against* the United States, obtained by way of cross-claim in bankruptcy proceedings of the lessee concerning the same royalties. No review of that judgment had been sought. The district court concluded that the judgment barred the claim and the Court of Appeals for the Tenth Circuit affirmed. But the Supreme Court reversed on the grounds that there was no statutory authority for the judgment on the cross-claim against the United States and, consequently, that it was void and could not operate as a bar. The Court stated at p. 514:

The reasons for the conclusion that this immunity may not be waived govern likewise the question of *res judicata*. As no appeal was taken from this * * * judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power.

So here the imposition of interest by the order of November 10, 1953, was without statutory authority and "the attempted exercise of judicial power is void." Consequently that order cannot operate as a bar.²

² If any judgment is *res judicata* on the question of interest it is the judgment fixing the fee affirmed by this Court in *United States v. Preston*, 202 F. 2d 740 (1953). That judgment did not impose interest and when it "was entered and became final the equitable

For the same reasons there is no merit to the remainder of appellees' contentions dealing with the equity of imposing interest (Br. 8-13, 20-21) and the suggestion of waiver or consent by payment of the proceeds of the sale into court to redeem the lands not sold from the lien (Br. 19-20). The Supreme Court in *United States v. N. Y. Rayon Co.*, 329 U. S. 654 (1947), made it perfectly clear at pp. 659-660 that neither the equity of imposing interest nor a supposed waiver or consent by anyone except Congress would permit the court "to supply the consent which only Congress can give to the imposition of interest against the United States."

CONCLUSION

Accordingly, it is submitted that the judgment appealed from should be reversed.

Respectfully,

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Department of Justice, Washington, D. C.

MARCH 1955.

jurisdiction of the court was exhausted." *Anglin & Stevenson v. United States*, 160 F. 2d 670, 673 (C. A. 10, 1947), certiorari denied, 331 U. S. 834. Appellees were thereafter precluded from claiming interest.

No. 14,555.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D.
SALLEE,

Appellees.

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D.
SALLEE,

Appellees.

PETITION FOR REHEARING.

JOHN W. PRESTON,
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OLIVER O. CLARK,
4632 Palm Drive,
La Canada, California,

DAVID D. SALLEE,
1253 Seventh Street,
Santa Monica, California,
Appellees.

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PAUL P. O'BRIEN, CLERK

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No. 14,555.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,
Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D.
SALLEE,
Appellees.

LEE ARENAS,
Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D.
SALLEE,
Appellees.

PETITION FOR REHEARING.

*To the Honorable United States Court of Appeals for the
Ninth Circuit and the Judges Thereof:*

Come now John W. Preston, Oliver O. Clark, and David D. Sallee, appellees in the above-entitled cause, and present this, their petition for a rehearing of said cause by this Court, and in support thereof respectfully show:

That the opinion of this Court filed herein on the 23d day of February, 1956, denying interest on the judgment for attorney fees and expenses advanced from and after a date of six months after entry of said judgment on April 6, 1951, should be reconsidered and set aside by this Court for the following reasons, to wit:

1. This fee proceeding is a part of the original Lee Arenas litigation begun in 1940, entitled *Lee Arenas, Plaintiff vs. United States of America, Defendant*, No. 1321-O'C Civil in the District Court of the United States for the Southern District of California. The District Court had jurisdiction of the parties and subject matter of said action under Title 25 U. S. C. A. section 345, and this court had jurisdiction on appeal under 28 U. S. C. A. section 1291.

2. The jurisdiction of the District Court herein is equitable in its nature, and such equitable jurisdiction was declared and sustained by this court in the Lee Arenas litigation, and especially in *Arenas v. Preston*, 181 F. 2d 62, 66, where the allowance of attorney fees was under consideration.

3. That the District Court has full equity jurisdiction and powers in this litigation is now the law of this case in view of the decision (opinion by Judge Stephens) in *Arenas v. Preston*, 181 F. 2d 62, 66, and other cases relating to attorney fees decided by this court.

4. The District Court has never exhausted or exercised its full equity jurisdiction herein, and the case is still open for the exercise of such jurisdiction.

5. The decision of this Court, entered on the 23d day of February, 1956, is in conflict with its previous fee decisions in this litigation, because it restricts and takes away to a large degree the equity powers of the District Court. The previous decisions of this Court sustaining the allowance of attorney fees and the fixing of liens upon the allotments obtained by appellees for the Indians to secure such fees are predicated largely upon the ground that such allowance and award are for the best interests of the Indians. To curtail this equitable jurisdiction and

power would make it more difficult for the Indians to secure expenses and legal services to enforce their legal rights against the United States of America. The best illustration of the injury that would result to the Indians from curtailment of the District Court's equitable jurisdiction and powers is found in the chronology of the Arenas litigation and the dilatory and inequitable conduct and practices of the Government disclosed in said litigation. The Government should not be allowed to take advantage of said conduct and practices.

6. The judgment for interest herein is not a judgment against the United States, and the payment of said judgment out of the Indian's land, or from the proceeds of the sale of said land, causes no depletion of the funds of the United States in its treasury, or otherwise. The United States is, at most, only a guardian or trustee of the Indian, and the payment of interest on a valid and lawful judgment against the Indian ward or *cestui que trust* in no way affects the United States in its sovereign capacity, or otherwise.

7. The decision of this Court is in conflict with the rule that where the United States is a necessary but nominal party to a suit, without liability for any money judgment rendered against other parties therein, the rule of sovereign immunity from liability for interest does not apply.

Miller v. Robertson, 266 U. S. 243, 257;

Brownell v. Bank of America, 214 F. 2d 855, 856-857, and comment in fn. 10;

United States v. Creek Nation, 295 U. S. 103, 113;

Standard Oil Co. v. United States, 267 U. S. 76, 79.

Cf.

St. Paul etc. Co. v. United States, 201 F. 2d 57;
Southern Printing Co. v. United States, 222 F. 2d
 431;
DuPont v. Lyles & Long Const. Co., 219 F. 2d
 328, 341 and cases cited.

8. The decision of this Court is in conflict with the rule that "when necessary in order to arrive at fair compensation, the Court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." (*Miller v. Robertson*, 266 U. S. 243, 258.) To the same effect are:

Concordia Ins. Co. v. School Dist., 282 U. S. 545,
 554-555;
Standard Oil Co. v. United States, 267 U. S. 76,
 79;
De La Rama v. De La Rama, 241 U. S. 154, 159-
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The Paquete Habana, 189 U. S. 453, 467;
Eddy v. LaFayette, 163 U. S. 456, 467;
Demotte v. Whybrow, 263 Fed. 366, 368.

Many State cases are to like effect.

The District Court exercised its sound discretion in allowing appellees interest on the judgment for fees from a date six months subsequent to the entry of said judgment.

9. The item called interest herein, is in reality, damages allowed appellees, as lien claimants, for delay in payment of a lawful judgment, or for redemption of the land or proceeds of sale thereof from the lien of said judgment; hence, interest was properly allowed by the District Court.

ARGUMENT.

I.

The Decision of This Court in *Arenas v. Preston*, 181 F. 2d 62, 66, That the District Court Has Full Equity Jurisdiction of the Parties and Subject Matter of This Litigation Is the Law of the Case and Is Binding Upon Both the District Court and This Court.

In *Arenas v. Preston*, 181 F. 2d 62, 66, this Court repudiated the argument of the United States that the District Court cannot apply the general rule "that a court of equity may settle incidental questions as well as fundamental questions, because the applicable statutes in this case do not specifically authorize it." This Court further said (*Id.*, pp. 66-67):

"When the United States authorized the Indian to make the United States an adversary party in its own courts, it did so knowing that the Indian by himself was incapable of taking advantage of the privilege and that attorneys fees and other expenses would be the unavoidable concomitant * * *. It seems to us that Congress could not have intended to commit the subject to its courts with any paralyzing limitation but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction."

The quoted statement, *supra*, was in answer to the question propounded by this Court on page 65 (181 F. 2d):

"Does the equitable jurisdiction of federal courts under the Act of 1894 (*i. e.*, 25 U. S. C. A. Sec. 345) invoke all equitable processes and hence permit the application of rules '* * * which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* * * *?'"

In its previous decision, *supra*, this Court decided that the District Court, under 25 U. S. C. A., Sec. 345, was given full equity jurisdiction and power to award attorneys fees and to impress an equitable lien upon the restricted lands of Arenas to secure payment thereof, and to sell said lands to satisfy such equitable lien. This jurisdiction extended to and included the United States by virtue of its consent to be sued under 25 U. S. C. A., Sec. 345. This Court's decision in *Arenas v. Preston*, 181 F. 2d 62, is now, and at all times since it was rendered has been, the law of this case.

It is important to note in this connection that the District Court has never exhausted or surrendered its full equity jurisdiction in this case but, on the contrary, in each of its judgments and decrees has retained such jurisdiction. In the District Court's judgment and supplemental decree [R. 3-8] awarding attorneys fees and expenses it was provided:

"SIXTH: The Court hereby retains jurisdiction over this action and the parties thereto and the subject matter thereof (for various and sundry purposes) * * * and in order to fully effectuate and enforce the supplemental decree herein in accordance with the equitable jurisdiction, practice and procedure of this court."

And, in the order for the sale of the real property of Lee Arenas and Eleuteria Brown Arenas to satisfy said judgment and supplemental decree the District Court provided [R. 14]:

"Further Ordered and Decreed herein that jurisdiction of this proceeding is retained to so adjust the lands and proceeds, or the lands or proceeds, remaining after satisfaction of said judgment as to cause

the Lee Arenas lands to bear three-fourths of the burden, and the Eleuteria Brown Arenas lands to bear one-fourth of the burden of said judgment; and jurisdiction is also retained to make all orders necessary, advisable, or expedient to put this adjustment into execution.”

It thus appears that at the time the District Court ordered interest to be paid on the judgment for fees and expenses it had full equity jurisdiction and power to make and enforce its order against the parties defendant, including the United States. It may also be added that the District Court now has the equity jurisdiction retained in its several decrees.

II.

The Decision of This Court, Entered on the 23rd Day of February, 1956, Is in Conflict With Its Decision in *Arenas v. Preston*, 181 F. 2d 62, and Other Fee Decisions, Because It Restricts and Takes Away to a Large Degree the Equity Powers of the District Court.

In this Court's former decision in *Arenas v. Preston*, 181 F. 2d 62, it was expressly held that the District Courts had the power “to fully exercise their general equitable jurisdiction” in cases within the provisions of the jurisdictional Act of 1894 (25 U. S. C. A., Sec. 345), including the settlement of “incidental questions as well as fundamental questions” even though the “applicable statutes in this case do not specifically authorize it.”

We think it is clear that the allowance of interest on a judgment in equity is one of the “incidental questions” referred to by the Court; and under the facts of this case the allowance of interest on the judgment and supple-

mental decree was authorized and proper under general equity rules and practice.

However, the decision of this Court on February 23, 1956, is, we respectfully submit, in conflict with the Court's former decision which, we believe, is the law of the case and which, moreover, correctly states the applicable rule. It is well settled in both federal and state courts that a court of equity whose jurisdiction has been invoked for one purpose may determine all equities between the parties which are connected with the main subject of the suit. This is true even though the original complaint would not lie for incidental relief alone.

30 C. J. S. 420, Sec. 67 of Equity;

Brame v. Keystone Credit Corp., 76 F. 2d 328,
cert. den. 296 U. S. 591;

Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273;

Taylor v. Spurway, 72 F. 2d 97;

Greer Inv. Co. v. Booth, 62 F. 2d 321;

Sears v. Rule, 27 Cal. 2d 131, and cases cited at
p. 149.

The relief incidental to the main subject matter will, if equitable, be granted "whether or not the particular relief was requested." (*Sears v. Rule*, *supra*, p. 149.) And, as said in *Pease v. Rathbun-Jones Eng. Co.*, 243 U. S. 273, 37 S. Ct. 284, at p. 286:

"A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation."

The allowance of interest on the judgment of the District Court was in accordance with the equitable principle that in equity interest may be allowed on a claim reduced

to judgment as compensation to the judgment creditor for loss of the use of his money.

Miller v. Robertson, 266 U. S. 243;

Spalding v. Mason, 161 U. S. 375, 396;

Young v. Godbe, 82 U. S. 562;

Curtis v. Innerarity, 6 How. 146, 154, 12 L. Ed. 380.

Many other cases are cited in appellees' brief, at pages 10-11.

The full exercise of its equitable jurisdiction by the District Court in cases within the purview of 25 U. S. C. A., Sec. 345 is an imperative if an Indian *cestui que trust* is to be in position to protect or enforce his right to an allotment of tribal lands. To restrict or curtail such jurisdiction would not be to the best interest of Indians, nor of their attorneys, for in that event it would become more difficult for any Indian to secure his legal rights against the United States. The history of the Arenas litigation illustrates the point.

It may well be doubted whether any lawyer would have accepted employment in the *Lee Arenas* case, if he had known or suspected that the Government would resort to the obstructing and delaying tactics it has employed throughout the case. As a matter of fact, the *Arenas* case was filed in December 1940. Judgment for Arenas was entered on May 14, 1945. The Government appealed therefrom to this Court, which affirmed the judgment as to Lee Arenas on December 12, 1946. The Government sought a rehearing which was denied by this Court on January 14, 1947. It then sought certiorari which was denied by the Supreme Court on June 9, 1947. Appellees

filed their petition for fees on October 24, 1947, but final judgment for fees was delayed until April 5, 1951. The Government and Arenas again appealed, and this Court affirmed on March 16, 1953. Shortly thereafter, on appellees' application, the District Court entered an order for sale of a sufficient amount of the Arenas lands to satisfy the judgment for fees. Arenas then requested appellees to permit him to sell at private sale enough of his lands to satisfy the judgment, and the Government approved such request. Eight different requests for postponements of judicial sales were made by Arenas and granted by appellees after appellees were entitled to such sale. The Government approved the delays and joined in the several stipulations that the proceeds of private sales be paid into the registry of the Court and that the lien of the judgment be transferred to such proceeds. Thus Arenas obtained delays aggregating about 18 months after the right to a judicial sale had accrued. It was not until August 23, 1954, that appellees received any payment whatever on their fees and expenses in the Lee Arenas case, without interest on the judgment awarded them on April 5, 1951. In other words, appellees rendered legal services to Lee Arenas over a period of more than fourteen years before they received one cent of compensation therefor. And, appellees received no part of their attorneys fees, awarded on April 5, 1951, for a period of more than three years thereafter, and then without interest.

The foregoing facts show the inequitable conduct of the Government, and likewise the inequity that would result from failure to allow interest on the judgment for more than three years before any payment was made thereon. Under such circumstances appellees are entitled

to interest on said judgment as a matter of equity, and the allowance and payment of interest on the judgment under such circumstances is incidental to the exercise of the general equitable jurisdiction of the District Court. Appellees respectfully insist that this Court, by its decision, has curtailed the equitable jurisdiction of the District Court, contrary to the law of this case established by the former decision of this Court.

III.

The Judgment for Interest Is Not a Judgment Against the United States and Is Not a Charge Against or Payable Out of Any Funds or Property of the United States, but Is Against Lee Arenas and Is Payable Solely Out of the Proceeds of the Sales of His Allotted Lands Now in the Registry of the District Court. Hence, the Rule of Sovereign Immunity Invoked by the Appellants Does Not Apply.

In so far as the proceeding for allowance of attorneys fees is concerned, the United States is a necessary nominal, but non-liable, party thereto. Because of the restricted nature of the lands of Arenas, the law required that the United States be made a party to any proceeding affecting said lands. But the judgment for fees was solely against Arenas, and it provided in this connection:

“FIRST: That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioners for and on behalf of said plaintiff, in the above-entitled action the sum of Ninety Thousand Dollars (\$90,000.00).” [R. 4.]

Other provisions of said judgment show that the judgment is a lien upon and shall be satisfied solely out of the "lands allotted to said plaintiff (Lee Arenas) by said allotment proceedings and * * * the entire interest, if any, in said lands in the hands of the United States of America." [R. 5.]

It is well settled by federal decisions that when a suit is against the United States, but no claim or debt is asserted against it but is asserted against other parties to the suit, the rule of sovereign immunity from liability for interest does not apply.

Miller v. Robertson, 266 U. S. 243, 257;

United States v. Creek Nation, 295 U. S. 103, 113;

Standard Oil Co. v. United States, 267 U. S. 76, 79;

Brownell v. Bank of America, 214 F. 2d 855, 856-857.

Cf.

St. Paul etc. Co. v. United States, 201 F. 2d 57;

Southern Printing Co. v. United States, 222 F. 2d 431;

DuPont v. Lyles & Long Const. Co., 219 F. 2d 328, 341, and cases cited.

In *Miller v. Robertson*, 266 U. S. 243, *supra*, the plaintiff Robertson sued Miller as Alien Property Custodian, White as Treasurer of the United States, and others, to establish a debt against funds in the possession of said officers of the United States, and the District Court gave judgment for plaintiff in the amount of \$259,597.21 with costs. The District Court allowed interest from July 3, 1919, but the Circuit Court of Appeals allowed interest

from June 29, 1916. "Appellants object on the ground that this is a suit against the United States, and interest is not allowable against it * * *." (*Id.*, pp. 256-257.) But the Supreme Court rejected this contention, saying, at page 257:

"While the suit, as held in *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591, 603 * * * is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest (citing code provisions and other authorities) does not apply."

It is also significant that the Court, in this connection, pointed out the true basis of the rule under which interest may be allowed, even though the United States is a party to the suit, but no relief is sought against it. The Court said, at pages 257-258:

"One who has had the use of money owing to another justly may be required to pay interest from the time payment should have been made. Both in law and in equity, interest is allowed on money due. (Citing case.) Generally, interest is not allowed upon unliquidated damages. (Citing case.) But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages. (Citing many federal cases.)"

In *United States v. Creek Nation*, 295 U. S. 103, *supra*, the Creek Nation sued the United States to recover the value of tribal lands wrongfully taken by the United States and by it sold to others. The Court said, in respect to the liability of the United States to make compensation

to the Creek Nation for said lands, and to pay interest on the amount due, at page 111:

“We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe * * * [p. 111].

“But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added.”

The Court allowed 5% interest from the date of taking.

The decision in the *Creek Nation* case shows: (1) That the fact that the United States is a party to a suit does not mean that it may assert its sovereign immunity from liability for payment of interest for the benefit of a party not entitled thereto; and (2) that even the United States cannot assert its sovereign immunity in its own behalf if to do so would mean avoiding payment of just compensation to one equitably entitled thereto.

In *Standard Oil Co. v. United States*, 267 U. S. 76, *supra*, the Oil Company libeled the United States to recover on insurance policies issued by the United States insuring the Company's ship LLAMA and her freight and advances against war risks. The trial court gave judgment for libelant, the Circuit Court of Appeals reversed, the Supreme Court granted certiorari and reversed the

Court of Appeals. In respect to interest the Supreme Court said, at page 79:

“Some question was made as to the allowance of interest. When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business. The policies promised that claims would be paid within 30 days after complete proofs of interest and loss had been filed with the Bureau of War Risk Insurance. The proofs seem to have been filed on January 11, 1917. The decree of the District Court will be corrected so as to allow for the total loss of the LLAMA, \$115,000, with interest at 6 per cent from February 11, 1917; total loss of the freight etc., \$44,686.82, with interest at 6 per cent from February 11, 1917; expenses incurred under sue and labor clauses, \$2,270.34, with interest at 6 per cent from February 11, 1917.”

The Supreme Court held the United States liable for interest in the absence of any statutory or contractual liability therefor, thus showing the rule of sovereign immunity will not be applied where it would be inequitable to do so.

In *Brownell, Atty. Gen. v. Bank of America*, 214 F. 2d 855, *supra*, the Bank asserted a debt claim against an enemy national's assets, and the Director of the Office of Alien Property allowed the principal, with interest. The District Court entered an order allowing post-vesting interest, and the Government appealed. The Court of Appeals affirmed the allowance of interest notwithstand-

ing the fact that neither the original World War I Act nor the amendment thereto provided for interest. Thus, again, the rule of sovereign immunity was held not to apply.

In *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299, *supra*, the United States requisitioned land for war purposes. The Lever Act authorized such taking, but contained no provision for interest. The Court said:

“Section 10 of the Lever Act authorizes the taking of property for public use on payment of just compensation. There is no provision for interest * * *.

“The compensation to which the owner is entitled is the full and perfect equivalent of the property taken.”

The Court allowed interest from date of taking.

It is true, of course, that the case last cited involved the taking of property for public use, and to that extent it differs from the instant case. But the cited case illustrates the point that when equity requires it, the courts will not apply the rule of sovereign immunity even when the United States is liable as a party. Obviously, there is no reason to apply the rule when the United States is only a necessary nominal party without liability to pay any part of the judgment rendered, including interest. Many other cases hold the United States liable for interest for the taking of property in the absence of statutory authorization.

In *Board of Commissioners v. United States*, 308 U. S. 343, the Supreme Court had this to say about the judicial rule regarding interest as an incident to the main relief sought (*Id.*, p. 250):

“In ordinary suits where the Government seeks, as between itself and a private litigant, to enforce a money claim * * * this Court has chosen that rule as to interest which comports best with general notions of equity. (Citing U. S. cases.) Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for judicial law-making.”

And the Court continued, at page 352:

“The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. (Citing cases.)”

These statements of the Supreme Court fully sustain the argument made herein (1) that where failure to allow interest would be inequitable, it should be allowed, and (2) that the rule applies to the United States. The cases cited, *supra*, also fully sustain the argument.

Under the facts of this litigation, as briefly stated herein and as shown by the former decisions of this Court in this case, there can be no doubt that appellees should be allowed interest, as a matter of right and of equity.

See, also,

DuPont v. Lyles & Long Const. Co., 219 F. 2d 328, 341-342;

Southern Printing Co. v. United States, 222 F. 2d 431, 435;

Royal Ind. Co. v. United States, 313 U. S. 289, 296.

In the *Royal Indemnity* case, *supra*, the Court said (313 U. S. 289, 296):

“But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damages, expressed in terms of interest, for nonpayment of the amount found to be due. (Citing cases.) * * *

“* * * even in a case of unliquidated damages ‘when necessary to arrive at fair compensation, the court in the exercise of a sound discretion may include interest as an element of damages.’ ”

The rule thus announced has equal application where the positions of the parties are reversed. The United States cannot logically and fairly invoke the equitable judicial rule and practice in favor of itself alone, but must follow it when the positions of the parties are reversed. In homely English “what is sauce for the goose is sauce for the gander.”

IV.

The District Court Had and Exercised Its Equitable Jurisdiction and Discretion in Allowing Interest on the Judgment for Attorneys Fees and Expenses, Hence the Decision in *Anglin & Stevenson v. United States*, 160 F. 2d 670, Is Not Applicable Under the Facts of This Case.

In *Anglin & Stevenson v. United States*, 160 F. 2d 670, the District Court clearly indicated that if "it had known that interest would be claimed, he would have 'probably lessened the amount' of the original judgment." (160 F. 2d at p. 672.) In other words, in such case the District Court would have exercised its discretion to allow a smaller fee and add interest thereon. Therefore, as the fee was ample without interest the District Court exercised its discretion to disallow interest. In the case at bar, however, the District Court exercised its discretion and its equitable power to and did allow interest.

Moreover, the two cases are different in other essential respects, which will now be set out. In the *Anglin & Stevenson* case the attorneys were promptly paid the full amount of the judgment awarded for fees as soon as said judgment was affirmed; but in the case at bar the principal amount of the judgment was not paid until about one and one-half years after affirmance of the judgment, and about three years after said judgment was rendered by the District Court. In the *Anglin & Stevenson* case no claim for interest was made until after the judgment was fully paid; but in the case at bar the claim for interest was made and allowed long before any of the Arenas property was sold, and also before any payment was made on the judgment. At the time interest was claimed and allowed in the *Arenas* case the equitable jurisdiction

and processes of the District Court had continued by reservation of jurisdiction in the decree and the award of interest was therefore a part of "one continuous litigatory process." (160 F. 2d at p. 673.) In the *Anglin & Stevenson* case the court held that "When the judgment was entered and became final (by payment, we suppose), the equitable jurisdiction of the court was exhausted." (*Id.*)

Another difference in the two cases is this: In the *Anglin & Stevenson* case the funds were not recovered, in any sense, by the attorneys for the heirs, but at all times had been and were in the custody of the United States in its sovereign capacity and, as the court said, "they thus became clothed with immunity from the exaction of interest." In the case at bar, the allotments of lands of the Arenases were actually recovered for them by their attorneys, and the proceeds of sales thereof, made by the Arenases by consent of the Government to satisfy appellees' judgment, were in the registry of the District Court and subject to the orders of that court.

Another distinction is pointed out by the Court of Appeals in the *Anglin & Stevenson* case in the following language (160 F. 2d 673):

"The rule of sovereign immunity from interest has been held inapplicable in a suit against the alien property custodian under the Trading with the Enemy Act, 50 U. S. C. A. Appendix, sec. 1 *et seq.*, *Miller v. Robertson*, 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265. In that case, interest was awarded for breach of contract. The court held that although the suit was against the Government, the claim was not against it, and the sovereign immunity from interest did not therefore apply. But, unlike our situation, the interest was allowed as a part of the adjudicatory

process. It was not allowed or claimed on the judgment as we are asked to do here.” (*i. e.*, on a judgment already paid).

In the *Miller v. Robertson* case, 266 U. S. 243, referred to in the last above-quoted language, the United States held in its custody the property or funds of an alien enemy. The suit was brought and judgment was given for breach of contract by the alien enemy. In our case the claim for fees is based upon *quantum meruit* which, in turn, rests upon the written contract of employment. No distinction can properly be made between the contract referred to in the *Miller v. Robertson* case and the contract between Arenas and his attorneys. Liability under assumpsit is not less than when fixed by specific provisions of a written contract.

The United States, as a stakeholder, possessed the funds of an enemy alien in *Miller v. Robertson, supra*. The United States, as trustee, held the real property of Arenas in the case at bar, but the funds of Arenas which were obtained from the sales of his lands were held, at all times, in the registry of the District Court. Only by implication may it be said that such funds were in the custody of the United States. Moreover, at all times after the original judgment for fees was rendered, the appellees had an equitable lien on the lands and funds of Arenas, and that lien could be discharged only by payment of the judgment for fees, with interest.

In view of the foregoing facts and distinctions we submit that the *Anglin & Stevenson* case is not in point, nor is it in any sense controlling in the case at bar. It may be observed that, if the *Anglin & Stevenson* case is invoked and applied as *stare decisis* under the facts of this case, it is in conflict with every concept and applica-

tion of equitable principles and procedures referred to in the many cases cited under Points I, II and III of this petition. Certainly, the United States is not entitled to invoke the rule of sovereign immunity from interest in this case, because the judgment imposes no liability against it. It has no property interest in the funds of Arenas, and it can suffer no diminution of funds held by it as sovereign by the payment of interest from the funds of Arenas.

V.

The Equitable Lien Impressed Upon the Allotted Lands of Arenas by and as Part of the Judgment for Fees Cannot Be Discharged Except Upon Payment of the Judgment, Together With Damages for Delay in Paying the Judgment.

The opinion does not make any mention of the above stated point, which was presented to the Court in slightly different form and language at pages 19-21 of appellees' brief. There can be no full redemption of the Arenas lands or funds derived from the sales thereof, the proceeds of which are on deposit in the registry of the District Court, until the full amount of the judgment, with damages for delay, is paid.

California Civil Code, Secs. 2905, 2912;

16 *Cal. Jur.* 324, 347;

San Pedro Lbr. Co. v. Reynolds, 121 *Cal.* 74;

Loughborough v. McNevin, 74 *Cal.* 250.

"Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay." (*Civ Code*, Sec. 2905.)

The sum of \$122,114.00 net realized from the sales of the Arenas property at private sale, was, by agreement of the parties, including the United States, paid into the registry of the District Court and the lien of the judgment was transferred to and impressed upon said funds. Under the California statutes, relating to the extinguishment of liens, the property thus subject to appellees' equitable lien can be redeemed only by payment of the judgment and damages for delay. (*Civ. Code*, Secs. 2905, 2912.)

There can be no doubt that appellees have been damaged by the delay of appellant Arenas in paying the judgment. The measure of such damages "is deemed to be the amount due by the terms of the obligation, *with interest thereon*." (Cal. Civ. Code, Sec. 3302. Emphasis added.) The California statutory rule accords with the rule in equity set forth, *ante*, hence is applicable.

While the Conformity Act is superseded by the Federal Rules of Civil Procedure, it is still true that in common law actions state law will be applied by the federal courts. It is also true that in suits in equity the federal courts will look to the laws of the state for ascertainment of substantive rights, and will enforce and protect rights given by a state statute which are properly the subject of an equity suit, and this is especially true when the state statute constitutes a rule of property.

35 C. J. S. 1236-1238, Sec. 166 of Federal Courts, and the many federal cases cited in notes 63-66.

Conclusion.

Wherefore, for the reasons stated, appellees respectfully urge the Court to grant their petition for a rehearing, and that upon further consideration the judgment of the District Court be affirmed in all respects.

Respectfully submitted,

JOHN W. PRESTON,

OLIVER O. CLARK,

DAVID D. SALLEE,

Appellees.

Certificate of Counsel.

I, John W. Preston, Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

JOHN W. PRESTON,

Petitioner.

No. 14557

**United States
Court of Appeals
For the Ninth Circuit.**

COLONIAL TRUST COMPANY,

Appellant.

vs.

GEORGE GOGGIN, Trustee in Bankruptcy of the
Estate of Intercontinental Airways, Inc.,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED

JAN 28 1955

PAUL P. O'BRIEN,

CLERK

No. 14557

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee:

CRAIG, WELLER & LAUGHARN,

817, 111 West 7th St.,

Los Angeles 14, Calif.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 59643-HW

In the Matter of:

INTERCONTINENTAL AIRWAYS, INC., a Corporation,

Alleged Bankrupt.

CREDITORS' INVOLUNTARY PETITION

To the Honorable Judges of the District Court of
the United States, for the Southern District of
California:

The verified petition of Coast Pro-Seal & Mfg. Co., Inc., a California Corporation; Air Parts, Inc., a California corporation, and California Mill Supply Corporation, a California corporation, doing business as California Waste and Wiper Co., respectfully represents:

I.

That the alleged bankrupt, Intercontinental Airways, Inc., has had its principal place of business at Lockheed Air Terminal, Burbank, California, and within the Southern District of California and within the jurisdiction of the District above named for a period of the greater portion of the six months immediately preceding the filing of this petition, and that said alleged bankrupt is not a municipal, railroad, insurance or banking corporation, or a building and loan association, but is engaged in the

business of selling airplane parts and other allied lines. [2*]

II.

That your petitioners are creditors of the above-named alleged bankrupt and hold provable claims against it, fixed as to liability and liquidated as to amount, amounting in the aggregate in excess of the value of securities held by it to the sum of more than \$500.00. [3]

* * *

IV.

Your petitioners allege that the alleged bankrupt is insolvent and that within four months preceding the filing of this petition, the alleged bankrupt committed an act of bankruptcy in that while insolvent it suffered or permitted a creditor to obtain a lien upon its property and permitted a judicial sale thereof to be set, and failed to have such lien vacated or discharged within five days before the date set for such sale, or other disposition of such property, and that the lien so placed on the said property, is a lien of the County of Los Angeles for taxes, and that the sale of the said property for said taxes is set for February 4, 1954, at 10 o'clock a.m. of said day, and that your petitioners are informed and believe that said alleged bankrupt while insolvent and within four months preceding the filing of this petition committed other and further acts of bankruptcy, in that it transferred portions of its property to one or more of its creditors with the

*Page numbering appearing at foot of page of original Certified Transcript of Record.

intent to prefer such creditors over its other creditors, and your petitioners are informed and believe that the effect of such transfers to said creditors has been to prefer such creditors over its other creditors.

Wherefore your petitioners pray that service of this petition, together with a subpoena, be made upon said alleged bankrupt as provided in the Acts of Congress relating to bankruptcy, [4] and that it may be adjudged by this court to be a bankrupt within the purview of this Act.

Dated: February 3, 1954.

COAST PRO-SEAL & MFG. CO.,
INC.,

By /s/ FRANK C. WELLER,
Its Authorized Agent.

AIR PARTS, INC.,

By /s/ FRANK C. WELLER,
Its Authorized Agent.

CALIFORNIA MILL SUPPLY CORPORATION,
d/b/a CALIFORNIA WASTE AND WIPER
CO.,

By /s/ FRANK C. WELLER,
Its Authorized Agent.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Petitioning
Creditors.

OATH TO PETITION

United States of America,
Southern District of California,
County of Los Angeles—ss.

Frank C. Weller, being first duly sworn, deposes and says that he is the authorized agent for the petitioners named in the foregoing petition; that the statements made in the foregoing petition subscribed by him are true except as to matters stated therein on information and belief, and as to those matters he believes them to be true.

/s/ FRANK C. WELLER.

Subscribed and sworn to before me this 3rd day of February, 1954.

[Seal] /s/ C. W. ROBINSON,

Notary Public in and for Said
County and State.

[Endorsed]: Filed February 3, 1954. [5]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 3rd day of February, 1954;

Whereas, a petition was filed in this court on the 3rd day of February, 1954, against Intercontinental Airways, Inc., a corp., alleged bankrupt above

named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Reuben G. Hunt, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Intercontinental Airways, Inc., a corp., shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed February 3, 1954. [6]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SEC-
TION 321, CHAPTER XI, OF THE BANK-
RUPTCY ACT

At Los Angeles, in said District, on April 1, 1954, before the said Court the petition of Intercontinental Airways, a corporation, that he desires to obtain relief under Section 321 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having

been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Reuben G. Hunt, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Intercontinental Airways, a corporation, shall attend before said referee on April 9, 1954, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Ben Harrison, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on April 1, 1954.

EDMUND L. SMITH,
Clerk.

By /s/ [Indistinguishable.]
Deputy Clerk.

[Endorsed]: Filed April 1, 1954. [7]

[Title of District Court and Cause.]

PETITION OF RECLAMATION OF
PROPERTY

The petition of Colonial Trust Company, a New York corporation, respectfully alleges:

I.

An involuntary petition in bankruptcy has been filed against the above-named alleged bankrupt and

George T. Goggin is the duly and qualified and acting Receiver in said proceedings.

II.

Prior to the filing of said involuntary petition in bankruptcy herein, this petitioner was and has continued to be the owner of a certain aircraft, including the engines, propellers and all appurtenances and accessories of said aircraft including the flight manual for said aircraft. Said aircraft is registered with the Civil Aeronautics Administration and carries a Registration Certificate of Airworthiness, Number N-53472, which Certificate of Registration was issued December 3, 1951, and bears Serial No. 2932. The aforesaid certificate shows Petitioner to be the owner of said [8] aircraft. Said craft is a Curtiss-Wright C-46 E, 54-passenger two-engine aircraft.

III.

All of the aforesaid property is now in the possession of said Receiver in bankruptcy.

IV.

Neither the alleged bankrupt nor the Receiver have any right, title or interest in and to the said property or any claim thereto, or any lien thereon.

V.

Demand has been made on the alleged bankrupt and upon the Receiver for the return of said property, but each has refused and failed to comply

with such demand and continues to deny petitioner possession of said property.

Wherefore, your petitioner prays that George T. Goggin, the said Receiver herein, be directed to surrender possession to your petitioner of the said property hereinabove described and that your petitioner have such other and further relief as is just and equitable in the premises.

COLONIAL TRUST COMPANY,
INC., a New York Corporation,

By /s/ H. SPRINGER,
Vice President.

OVERTON, LYMAN, PRINCE
& VERMILLE,

By /s/ DAN BRENNAN,
Attorneys for Colonial Trust
Company.

Duly Verified.

[Endorsed]: Filed March 11, 1954. Referee. [9]

[Title of District Court and Cause.]

ANSWER TO PETITION OF RECLAMATION
OF PROPERTY OF COLONIAL TRUST
COMPANY

Comes now George Goggin by and through his attorneys of record, Craig, Weller & Laugharn, and in response to the "Petition of Reclamation of Property" of the Colonial Trust Company, admits, alleges and denies as follows:

I.

Admits the allegations contained in paragraphs I, II, III and V.

II.

Denies both generally and specifically each, every and all of the allegations contained in paragraph IV of the said petition.

For a Further Separate and Affirmative Defense,
Alleges as Follows:

I.

That the said aircraft was delivered to the alleged bankrupt herein on or about July 30, 1953, by Air America, lessee, from the petitioner herein of the said aircraft.

II.

That on or about July 30, 1953, the alleged [13] bankrupt and the said Air America entered into an oral agreement whereby the alleged bankrupt was to perform on the said aircraft certain maintenance, installations and repair necessary to place the plane in operating condition and to comply with the requirements and specifications of the Civil Aeronautics Administration which had grounded the aircraft until the said work had been performed.

III.

That thereafter in accordance with the said agreement, the alleged bankrupt herein did perform the agreed installations, repair and maintenance and billed the said Air America as follows:

| | |
|--|--------------------|
| Invoice dated August 31, 1953, for installation of two Shot CO ₂ | \$ 3,352.50 |
| Invoice dated August 31, 1953, for repair of corrosion and installation of new toilets and other maintenance and repair work | 6,013.03 |
| Invoice dated November 20, 1953, for removing two aircraft engines and working off "flight squawks"..... | 1,478.06 |
| Total..... | <u>\$10,843.59</u> |

IV.

That the invoice dated November 20, 1953, as set forth hereinabove was inadvertently and erroneously billed to U. S. Airlines, who had previously been the lessee on the said plane, but your respondent is informed and believes and therefore alleges had returned the said aircraft to the possession of Air America, prior to the making of the oral contract and the delivery of the aircraft on or about July 30, 1953.

V.

That your respondent is informed and believes and therefore alleges that after the completion of the said work the said aircraft involved in this petition was stored with and remained in [14] the possession of the alleged bankrupt herein; that on or about September 4, 1953, the date of the completion of the work requested about it, the said storage began to run at the rate of \$50.00 per day and an invoice was issued to U. S. Airlines in the amount

of \$2,850 for the storage for the period of September 4, 1953, through October 30, 1953; that the said billing to U. S. Airlines was erroneously made since the said U. S. Airlines had surrendered the said aircraft to Air America, prior to the making of the oral contract herein and the delivery of the craft to the alleged bankrupt on or about July 30, 1953; that thereafter an invoice was issued to Air America in the amount of \$3,100 covering the storage at the rate of \$50 per day from October 31, 1953, through December 31, 1953; that the said rate of storage continued against the said ship thereafter and that this alleged bankrupt estate should be reimbursed and is due storage at the rate of \$50 per day, from and after December 31, 1953, to the date of any release of this aircraft to the petitioner or any other person herein.

VI.

That the respondent herein has a lien on the said aircraft for the work performed on it in the amount of \$10,843.59 and also in the amount of \$10,400, for storage of the said aircraft.

Wherefore, your respondent prays that the release prayed for in the petition herein be denied by this court, and this court make an order fixing and determining that the alleged bankrupt herein has a lien in the amount of \$10,843.59 for work, maintenance and services performed on the said aircraft and in the amount of \$10,400, for the storage thereof from and after September 4, 1953, which lien

shall attach to the aircraft and that the aircraft shall not be delivered or returned to the petitioner herein, or any other [15] person unless and until such time as the said sum represented by the lien is paid.

GRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Receiver.

Duly verified.

[Endorsed]: Filed March 30, 1954, Referee. [16]

[Title of District Court and Cause.]

MEMORANDUM OPINION ON PETITION
FOR RECLAMATION OF PROPERTY ON
WHICH TRUSTEE CLAIMS A LIEN

Petition for reclamation by Colonial Trust Co., a corporation, to recover possession of a certain airplane in the possession of the Receiver in Bankruptcy, and his answer thereto claiming a lien for repairs on said airplane in the amount of \$10,843.59, and a lien for certain storage charges.

Overton, Lyman, Prince & Vermille, Attorneys for Petitioner.

Craig, Weller & Laugharn, Attorneys for Receiver.

I.

Statement of the Case

This is an involuntary bankruptcy case commenced Feb. 3, 1954. On that date George Goggin

was appointed and qualified as Receiver in Bankruptcy. On March 11, 1954, Colonial Trust Co. filed its petition to reclaim a certain airplane in possession of the bankrupt at the date of bankruptcy and now in the possession of the Receiver, upon the ground that it was the owner thereof and the bankrupt estate did not have any interest therein. On March 30, 1954, the Receiver filed an answer to [18] said petition in which he admitted title in the petitioner but asserted that the plane should not be turned over to it until it paid to the estate the sum of \$10,843.59 for repairs made upon said plane by the bankrupt, and storage charges thereon from Sept. 4, 1953, at the rate of \$50.00 per day until paid, and prayed for an order declaring a lien upon the plane for said repairs and charges. A hearing was held before the Referee and the matter submitted to him for decision.

II.

Statement of the Evidence

Colonial Trust Co., under date of Aug. 30, 1951, leased the airplane to American Airways, Inc., a corporation, pursuant to a written agreement, which provided that the lessee should keep the plane in good repair at its own expense. While the plane was in use by American Airways the Civil Aeronautics Authority of the United States, pursuant to Title 49, Sec. 555 of the U. S. Code, caused the plane to be grounded for repairs. The American Airways complied with this order and placed the plane with the bankrupt for the needed repairs. The bill for the same was \$10,843.59. The completed repairs were ap-

proved by the U. S. Civil Aeronautics Authority. No evidence was presented to show that the repairs, or any of them, were unnecessary, or that the charges were unreasonable, or that the plane had not been benefitted by the repairs to the extent of the amount charged. The bankrupt corporation knew who held the legal title to the plane, but did not notify the Colonial Trust Co., of the contemplated repairs or get its written consent for the making of the repairs. The repairs were completed on Sept. 4, 1953. It was customary for the bankrupt, after completing repairs on an airplane, to make a storage charge until the airplane was removed from its [19] premises.

III.

Question Presented

The sole question presented is whether there is any basis, legal or equitable, for the liens claimed by the Receiver.

IV.

Comment on the Law

There does not appear to be any basis for a legal lien, since the provisions of Secs. 1208.61 and 1208.62 of the Cal. Code of Civil Procedure were not followed. No notice was given to the owner and no consent was obtained from it authorizing the repairs. Petitioner contends that under these sections the most the lien can be is \$250.00 and the bankruptcy court cannot impose a larger one.

But the question remains whether or not this Court may impress an equitable lien upon the plane, even though the legal lien could not exceed \$250.00.

Courts of bankruptcy are essentially courts of equity (in re Loose SD. Cal., 52 F. S. 20, 54 ABR, NS, 786; Stegman v. Knudsen, CCA. 9, 152 F. (2) 871), at least in the sense that in the exercise of the jurisdiction conferred upon them by the Bankruptcy Act they apply the principles and rules of equity jurisprudence (in re L. A. Lumber SD, Cal. 46 F. S. 77); in re E. C. Denton Stores, ND, Ohio, 5 F. S. 307, 24 ABR, NS, 396.

Equity will use its extraordinary powers to the end that justice may be done in each individual case presented. Pugh v. Phelps, 19 P. (2) 315, 37 N. M. 126. A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity. Deweese v. Reinhard, 165 U. S. 386, 17 S. Ct. 340. [20]

One of the maxims of equity is that he who seeks equity must do equity. This maxim is applicable to bankruptcy proceedings. Litzke v. Gregory, CCA, 8, 1 F. (2) 112, 4 ABR, NS, 668; in re E. C. Denton Stores, ND, Ohio, 5 F. S. 307, 24 ABR, NS, 396; Stewart v. Ganey, CCA, 5 116 F. (2) 1010, 44 ABR, NS, 199; in re Lilyknit Silk Underwear, CCA, 2, 73 F. (2) 52, 26 ABR, NS, 662; Searle v. Mechanics

Loan and Trust, CCA, 9, 249 F. 942, 41 ABR 786. On seeking equitable relief, petitioner must be prepared to concede every equitable right to which his adversary is entitled. *Cityco Realty v. Slaysman*, 153 Atl. 278, 160 Md. 357; *Hammock v. Oakley*, 154 So. 906, 228 Ala. 588; *Fritz v. Bowcock*, 178 N. E. 375, 346 Ill. 111; *O'Brien v. O'Brien*, 197 C. 577, 241 P. 861. Equitable principle that "he who seeks equity must do equity" applies in respect to equitable terms imposed as a condition precedent to equitable relief. *Jones v. McGonigle*, 37 S. W. (2) 892, 327 Mo. 457; *Milanko v. Austin*, 241 S. W. (2) 881, 362 Mo. 357.

When a litigant goes into equity, the Court may refuse its aid to enforce an unconscionable demand, since he who seeks equity must do equity. *Mayfield v. British & American Mortgage*, 88 S. E. 370, 104 S. C. 152. What the petitioner is endeavoring to do here is to quiet title to the plane: a proceeding in equity. (*Benson v. Shotwell*, 87 C. 49, 25 P. 249.) And title to personal property may be quieted. Cal. Code Civ. Proc., Sec. 738. Equity, in quieting title to property, will not deny compensation for expenditures made in improving or preserving the property. *Warner v. Tullis*, 218 NW. 575, 206 Ia. 680; *Tutt v. Van Voast*, 36 C. A. (2) 282, 97 P. (2) 869; 74 C. J. S. 153, and cases cited. Likewise when a mortgagor seeks to set aside a foreclosure sale. *Young Mines v. Sevringhaus*, 298 P. 628, 38 Ariz. 160. [21]

Equity will not enforce a technical legal right (such as that asserted here by petitioner) to the unconscionable injury of the other party. *U. S. v. Dug-*

gan, CCA, 8, 210 F. (2) 926. Equity will protect the equitable rights of the adversary arising on his answer, regardless of the nature of the relief sought by the petitioner. Fidelity Union Trust v. Multiple Realtys Construction, 26 A. (2) 155, 131 N. J. Eq. 527. Terms imposed upon petitioner as the condition of his obtaining equitable relief must consist of awarding or securing to the respondent something to which he is justly entitled by principles and doctrines of equity, although not perhaps by those of the common law. Anderson v. Purvis, 44 S. E. (2) 611, 211 S. C. 255; Lindsey v. Clark, 69 S. E. (2) 342, 185 Va. 991.

The petitioner here will be unjustly enriched if it gets back the plane without paying the repair charges and reasonable charges for storage. A court of equity will prevent unjust enrichment. U. S. v. Adamant, CCA, 9, 197 F. (2) 1; Lewis v. Wisconsin Banking Commission, 275 N. W. 429, 225 Wis. 606.

The bankrupt, prior to bankruptcy, and the Receiver, afterwards, were subject to rent charges for the premises upon which the plane was located. In the case of *in re John H. Parker Co.*, ND, Ohio, 45 ABR 34, 268 F. 868, it was held that the storage charges paid by a Receiver in Bankruptcy for the preservation of the property of a third person prior to the filing of a petition in reclamation by that person, and pending the determination of the Court upon the petition, should be paid by that petitioner. The amount charged should be reasonable and proportionate to the total rent charges for the premises.

The ruling here should follow the Parker case, in principle, since that ruling appears to be just and equitable. The actual amount of the storage charge, however, [22] should not be determined until after a special hearing, upon due notice to the reclamation petitioner.

V.

Conclusion

It appears to the Referee that it would be unconscionable if the petitioner were to get back its plane without paying the repair and reasonable storage charges. If petitioner does not pay it will fail to do the equity required and will be unjustly enriched. The bankruptcy court is not bound to follow the California law above cited when determining, as a matter of equity, what is the just and proper thing to do. It is true, as stated by Judge Yankwich of this court that contractual rights in bankruptcy are to be determined by state laws and the decisions determining them rather than by general bankruptcy principles. (In re Quartz Crystal Products, SD. Cal., 71 F. S. 949.) But here there is not any contractual relation between the petitioner and the bankrupt. Cal. Code Civ. Proc. Secs. 1208.61 and 1208.62, impose a statutory, not a contractual, liability on the owner of the plane. And petitioner, by leasing the plane to American Airways, placed the plane in the power of the American Airways to make needed repairs, particularly when it was ordered to do so by the U. S. Civil Aeronautics Authority. Petitioner would have had to make the

repairs itself before it could fly the plane again, if the bankrupt had not done so.

Counsel for the Receiver will, pursuant to General Rule 7a of this Court, prepare, serve and file appropriate findings of fact, conclusions of law and order.

Dated: May 21, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed May 21, 1954, Referee. [23]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ON PETITION OF
RECLAMATION OF PROPERTY BY CO-
LONIAL TRUST COMPANY

This matter having come on for hearing on the verified "Petition of Reclamation of Property" of the Colonial Trust Company on March 30, 1954, at the hour of 2:00 p.m., thereof; and the petitioner having appeared by and been represented through its counsel Overton, Lyman, Prince & Vermille, by Dan Brennan, and the receiver, George T. Goggin, having appeared by and been represented through his counsel, Craig, Weller & Laugharn by C. E. H. McDonnell; and evidence, both oral and documentary, having been offered and received, the Referee

does now make the following Findings of Fact, Conclusions of Law and Order based thereon:

Findings of Fact

I.

The Colonial Trust Company (hereinafter referred to as "the petitioner") was at the time of the commencement of bankruptcy herein the legal owner of a C-46 aircraft, serial No. 2932, CAA certificate No. N-53472. The said aircraft was in the possession of the debtor herein at the commencement of [24] this proceeding by the filing of an involuntary petition in bankruptcy on February 3, 1954.

II.

On August 30, 1951, petitioner leased to American Airways, Inc., by written agreement, the C-46 aircraft involved in this litigation. By virtue of the said leasing agreement the lessee, American Airways, Inc., was under an obligation to keep the said aircraft in good repair at its own expense and at all times in an operable condition. The said American Airways, Inc., caused the aircraft to be operated as a passenger aircraft but later was required by the Civil Aeronautics Authority of the United States to ground said plane and make needed repairs thereon.

III.

On or about July 30, 1953, American Airways, Inc., grounded said plane pursuant to said requirement and entered into an oral agreement with the debtor corporation whereby the debtor corporation agreed to make the following necessary repairs: Re-

pair corrosion around bulkheads behind urinals, perform the mandatory modifications of the CO₂ fire control system, remove engines and work out "flight squawks" on the airframe. The debtor corporation performed the said work pursuant to the said oral agreement for a reasonable sum of \$10,843.59, no portion of which has been paid, and the same was due and owing at the date of the commencement of the within bankruptcy proceedings.

IV.

The work performed as aforesaid by the debtor corporation was of benefit to the aircraft and indispensable to the future operation of the aircraft, particularly since the same had been grounded by order of the Civil Aeronautics Authority of the United States for the purpose of having said repairs [25] made.

V.

The repairs were completed on or about September 4, 1953, and thereafter the plane remained in the possession of the debtor corporation and was in the possession of the debtor corporation at the commencement of these bankruptcy proceedings.

VI.

That it was customary for the debtor corporation to charge reasonable storage for aircraft left on its premises after the completion of work thereon.

VII.

The bankrupt corporation knew who held the legal title to the plane, but did not notify the Colonial Trust Company of the contemplated re-

pairs or get its written consent for the making of the repairs.

Conclusions of Law

I.

That the debtor corporation has an equitable lien against the C-46 aircraft, described as before, in the amount of \$10,843.59, which the petitioner in equity and good conscience must pay before surrender of possession of the aircraft to it.

II.

That the respondent must pay to the Receiver reasonable charges for the storage of said C-46 aircraft, the same to be later fixed by the Referee upon hearing after due notice.

Now, Therefore,

It Is Ordered that the petition of Colonial Trust Company herein be and the same hereby is granted, but that the receiver shall retain possession of the said C-46 aircraft, No. N-53472, until the payment to this estate of the sum of \$10,843.59, together with reasonable storage from and after [26] September 4, 1953, to the date when the plane is delivered into the possession of Colonial Trust Company, the amount and rate of such storage to be fixed and determined upon a hearing to be held before the Referee on notice to the petitioner Colonial Trust Company.

Dated: June 4, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed June 4, 1954, Referee. [27]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER

To the Honorable Reuben G. Hunt, Referee in
Bankruptcy:

The petition of the Colonial Trust Company respectfully represents:

I.

This petitioner is the owner of aircraft #N-53472 having first appeared herein in a petition of reclamation for said aircraft filed March 12, 1954.

II.

That on the 4th day of June, 1954, an order was made by the Referee herein and filed in this court, a copy of which is hereto annexed marked Exhibit "A" and by this reference made a part hereof.

III.

The Colonial Trust Company being aggrieved by said order prays for a review thereof and complains that the court committed several errors in said order, more particularly set forth as follows: [28]

1. The court erred in concluding that the alleged bankrupt had an equitable lien on said aircraft for the reason that the evidence established.

(a) that the Colonial Trust Company was at all relevant times the legal registered owner of aircraft bearing Civil Aeronautics Administration Certificate #N-53472; and

(b) that the alleged bankrupt knew who held legal title, but failed to notify the Colonial Trust Company of the contemplated work or get its written consent thereto; and

for the further reason that the evidence established that the work was performed in the State of California at the request of and for the account of Air America, Inc., and/or United States Airlines and/or American Airways, Inc., and under the law of said State and of the United States neither the alleged bankrupt nor the Receiver has any lien claim in excess of \$250.00 against the aircraft itself. (See California Civil Code, sections 1208.61 and 1208.62.)

2. The court erred in failing to order the Receiver to release said aircraft to the possession of the Colonial Trust Company upon the payment of the sum of \$250.00 for the reason that that is the law of the case as set forth in California Civil Code, Sections 1208.61 and 1208.62.

3. The court erred in failing to hold that the alleged bankrupt had no lien on said aircraft in excess of \$250.00 for the reason that that is the law of the case as set forth in California Civil Code, Sections 1208.61 and 1208.62.

4. The court erred in making its finding that \$10,843.59 was a reasonable sum for the work performed by the alleged bankrupt for the reason that there was no evidence offered as to the reasonableness of the charges of the alleged bankrupt.

5. The court erred in finding that the work performed by [29] the alleged bankrupt "was of benefit to the aircraft and indispensable to the future operation of the aircraft, particularly since the same had been grounded by order of the Civil Aeronautics Authority of the United States for the purpose of having said repairs made" for the reason that there was no evidence offered in support of said finding.

6. The court erred in finding that repairs were completed on or about September 4, 1953, for the reason that the evidence shows that the work has not been completed and more particularly the evidence shows the engines have not yet been replaced on the aircraft.

7. The court erred in holding that the Colonial Trust Company must pay to the Receiver reasonable charges for the storage of said aircraft for the reason that the alleged bankrupt and the Receiver have and continue to retain possession of said aircraft against the will of the Colonial Trust Company, the legal owner thereof.

Wherefore, the Colonial Trust Company prays that said Order be reviewed by a Judge of this court and that the Referee promptly prepare and transmit to the clerk his Certificate thereon together with a statement of the questions presented and a transcript of the evidence taken at the hearing, together with all exhibits therein offered; and that said Order be vacated and set aside; and that an

Order be made and entered ordering the Receiver to surrender possession of said aircraft to the Colonial Trust Company upon the payment of the sum of \$250.00.

OVERTON, LYMAN, PRINCE &
VERMILLE,

By /s/ DAN BRENNAN,

Attorneys for Colonial Trust
Company.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 9, 1954, Referee. [30]

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW OF REFEREE'S
ORDER RELATIVE TO REPAIR AND
STORAGE CHARGES ON AIRPLANE

The undersigned Referee in Bankruptcy presents herewith to the Court his Certificate on Review of his order made and entered herein on June 4, 1954, requiring Colonial Trust Company, which had filed and prosecuted herein a petition to reclaim an airplane in possession of the Receiver in Bankruptcy, to pay certain repair and storage charges to the Receiver before the petition was granted and the airplane delivered to the Colonial Trust Company.

Craig, Weller & Laugharn, Attorneys for Receiver.

Overton, Lyman, Prince & Vermille, Attorneys for Petitioner.

I.

Statement of the Case

This is covered up to May 21, 1954, in the Referee's Memorandum Opinion filed in this matter on that date. Thereafter [36] and on June 4, 1954, the Referee signed, filed and entered his Findings of Fact, Conclusions of Law and Order on Petition of Reclamation on property by Colonial Trust Company. Thereafter, and on June 9, 1954, Colonial Trust Company filed its petition for a review by the Judge of the said order of the Referee.

II.

Question Presented

This is set forth in the Memorandum Opinion.

III.

Comment on the Evidence and the Law

This is also set forth in the Memorandum Opinion.

IV.

Findings of Fact, Conclusions of Law and Order

These are set forth in the Order entered herein on June 4, 1954.

V.

Documents Accompanying This Certificate

1. Petition of Reclamation of Property, filed Mar. 11, 1954.

2. Order to Show Cause, filed Mar. 12, 1954.
3. Answer to Petition of Reclamation of Property of Colonial Trust Company, filed Mar. 30, 1954.
4. Memorandum Opinion on Petition for Reclamation of Property on which Trustee Claims a Lien, filed May 21, 1954.
5. Findings of Fact, Conclusions of Law and Order on Petition of Reclamation of Property by Colonial Trust Company, filed June 4, 1954.
6. Petition for Review of Referee's Order, filed June 9, 1954.
7. All Exhibits received in evidence.
8. Reporter's Transcript of hearing on Mar. 30, 1954, filed Apr. 20, 1954.

Dated: June 9, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed June 9, 1954. [37]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 15, 1954

Present: Hon. Harry C. Westover,
District Judge.

Deputy Clerk: Mary O. Smith. Reporter: None.

Counsel for receiver: No appearance.

Counsel for petitioner: No appearance.

Proceedings:

The Petition of Colonial Trust Company for Review of Referee's Order of June 4, 1954, having heretofore been heard and submitted,

It Is Ordered that said Order be affirmed, counsel for Receiver to prepare formal order.

EDMUND L. SMITH,
Clerk;

By MARY O. SMITH,
Deputy Clerk. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Colonial Trust Company hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order entered in the office of the Clerk of this Court on the 15th day of July, 1954, affirming the

Order of the Referee denying Petitioner's petition to reclaim certain property from the trustee.

Dated this 16th day of August, 1954.

OVERTON, LYMAN, PRINCE &
VERMILLE,

By /s/ DAN BRENNAN,
Attorneys for Colonial Trust
Company, Appellant.

[Endorsed]: Filed August 16, 1954. [39]

In the District Court of the United States for the
Southern District of California, Central Division

Bankruptcy No. 59,643-HW

In the Matter of

INTERCONTINENTAL AIRWAYS, INC., a Cor-
poration,

Bankrupt.

ORDER ON PETITION OF COLONIAL TRUST
COMPANY FOR REVIEW OF REFEREE'S
ORDER

This matter having come on for hearing on the verified petition for review of Colonial Trust Company on the 12th day of July, 1954, at the hour of 10:00 a.m. thereof; and the same having been submitted on briefs, and the court being fully advised in the premises,

Now, Therefore,

It Is Ordered that the petition of Colonial Trust Company to review the order of the Referee entered on June 4, 1954, fixing and determining that an equitable lien in favor of the respondent bankrupt estate exists against that certain C-46 Airplane No. 2932 be and the same hereby is denied, and the said order be and it hereby is affirmed; and

It Is Further Ordered that by this order this court does specifically adopt as its own the Findings of Fact, Conclusions of Law and Order made and entered by the said Referee on the said [42] matter on June 4, 1954.

Dated: Aug. 31, 1954.

/s/ HARRY C. WESTOVER,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed August 31, 1954.

Docketed and entered September 3, 1954. [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Colonial Trust Company has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Order entered in the office of the Clerk of this Court on the 15th day of July, 1954, and hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order entered in the Office of the Clerk of this Court on the 3rd day of September, 1954, which Orders affirmed the Order of the Referee denying Petitioner's petition to reclaim certain property from the trustees.

Dated this 14th day of September, 1954.

OVERTON, LYMAN, PRINCE
& VERMILLE,

By /s/ DAN BRENNAN,
Attorneys for Colonial Trust
Company, Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 14, 1954. [44]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE AND DOCKET
RECORD ON APPEAL

It Is Stipulated and Agreed by and between the attorneys for the parties hereto that the Petitioner-Appellant, Colonial Trust Company, may have to and including the 12th of November, 1954, in which to file the record and docket the above-entitled cause in the United States Court of Appeals for the Ninth Circuit.

Dated this 13th day of September, 1954.

OVERTON, LYMAN, PRINCE
& VERMILLE,

By /s/ DAN BRENNAN,
Attorneys for Colonial Trust Company, Petitioner-Appellant.

CRAIG, WELLER &
LAUGHARN.

By /s/ C. E. H. McDONNELL,
Attorneys for Receiver-Appellee.

It Is So Ordered this 14th day of September, 1954.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed September 14, 1954. [55]

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 59,643-HW

In the Matter of:

INTERCONTINENTAL AIRWAYS, INC., a Corporation,

Debtor.

REPORTER'S TRANSCRIPT OF HEARING
ON ORDER TO SHOW CAUSE, COLONIAL
TRUST COMPANY VS. RECEIVER, HELD
ON TUESDAY, MARCH 30, 1954, AT 2
O'CLOCK P.M.

Appearances:

For the Receiver:

CRAIG, WELLER & LAUGHARN, By
C. E. H. McDONNELL, ESQ.

For the Petitioner, Colonial Trust Co.:

OVERTON, LYMAN, PRINCE &
VERMILLE, By
DAN BRENNAN, ESQ.

* * *

Mr. McDonnell: There is one matter on the calendar, the Colonial Trust Company. That is a petition in reclamation lodged against this estate. [2*]

* * *

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Referee: There is no question about the title?

Mr. McDonnell: None whatsoever.

The Referee: The only question is whether this estate can assert a lien? [3]

Mr. McDonnell: That is right. [4]

* * *

Mr. Brennan: The first exhibit is a lease dated August 30, 1951, with a certificate by the Vice President of the Colonial Trust Company that the document is an exact duplicate of the original.

The Referee: That will be Petitioner's Exhibit No. 1.

Mr. Brennan: The second in order is a photostat of a trust certificate dated August 30, 1951, to which is attached a certificate of the Vice President of the Colonial Trust Company certifying this photostat to be an exact duplicate of the original.

The third is a photostat of the Certificate of Registration issued by the Administrator of the Civil Aeronautics Administration, dated December 3, 1951, and the original of which is on the aircraft as required by law.

The fourth item is a letter of the Colonial Trust Company dated March 5, certifying that it has not disposed of the aircraft and is the owner at this time.

The fifth is a notice of the Colonial Trust Company, dated December 12, addressed to Air America, Inc., notifying Air America, Inc., of the defaults

under the lease and demanding the immediate possession of this aircraft and the surrender of the aircraft and so on.

The sixth and last item is a letter of Air America, Inc., dated January 29th, addressed to Colonial Trust Company, acknowledging the default and agreeing that the Colonial Trust Company is entitled to the possession of this [9] aircraft.

All of these deal with Aircraft No. 53472.

* * *

A. W. SCHWIMMER

called as a witness on behalf of the Receiver, being first duly sworn, testified as follows: [10]

Direct Examination

By Mr. McDonnell:

Q. Mr. Schwimmer, are you acquainted with the alleged bankrupt here? A. I am.

Q. Are you an officer? A. The president.

Q. And are you acquainted with a C-46 aircraft, No. N-53472? I believe it was being operated by Air America. Do you know about that aircraft?

A. Yes.

Q. And do you know about the maintenance work that was done and the repair work that was done on it? A. Yes.

Q. Did you make the contract or the arrangements for that, Mr. Schwimmer? A. I did.

Q. Where were you when you made the arrangements? A. In New York.

(Testimony of A. W. Schwimmer.)

Q. And with whom did you deal in New York?

A. I dealt with Mr. Shore of Air America, Mr. Miller of Air America and U. S. Air Lines, and Mr. Rich.

Q. Is that R-i-c-h? A. Yes.

Q. Is he also known as Donald R-e-i-c-h-g-o-t-t?

A. Yes. [11]

Q. Was the agreement in writing?

A. No, the agreement that we made was verbal.

Q. All right, and would you relate in general what that agreement was?

A. Well, Intercontinental was doing the maintenance on this aircraft. The airplane had a considerable amount of corrosion back in the rear bulkhead behind the urinals, and the CAA had permitted it to be flown only up until the next heavy operational check, at which time all the structure back there had to be torn out and replaced, rebuilt.

There was also at that time a mandatory modification to the fire control system, the CO₂ system, coming up for all C-46s. So it was the desire of Mr. Shore and Mr. Miller and Mr. Rich that all of this work be done at one time. The airplane was flown into Burbank on one of its routine flights and grounded and the work was done.

Q. Do you know about when that was that it was brought into Burbank?

A. I believe in July or August of last year.

Q. Late in July or early August, somewhere around the 29th?

A. Somewhere around there, yes.

(Testimony of A. W. Schwimmer.)

Q. And was there also some agreement to do some of the other work on the engines, like removing the engines?

A. As I recall, there were quite a few jobs that were done, removal of the engines and some interior work and [12] other odds and ends.

Q. I see. May I ask you this, was there some connection between United Air Lines and Air America, to your knowledge, Mr. Schwimmer?

A. United Air Lines?

Q. U. S. Air Lines, rather.

A. Yes, to the best of my knowledge Mr. Miller, who is the president or was the president of U. S. Air Lines was the major stockholder of Air America, and I believe Chairman of the Board as well.

Q. What I am trying to get at is this, did U. S. Air Lines sometimes use this aircraft N-53472?

A. Yes, for a time they had it on a sublease with Air America.

Q. Was your agreement concerning the repair of this corrosion and compulsory modification, was that with Air America or U. S. Air Lines?

A. That was with Air America.

Q. I see. All right. I am going to show you Work Order No. 601 on the letterhead of Intercontinental Airways, Inc., and ask you if that is for an airplane, C-46-F, and ask you if that is the work order, if you can identify it as the original of the work order for the correction of the corrosive condition behind the lavatory? Is that the work order?

(Testimony of A. W. Schwimmer.)

A. Yes, this is. [13]

Mr. McDonnell: I will offer this as Trustee's Exhibit first in order, Respondent's first in order.

Q. I will show you another work order, No. 602, dated July 30, 1953, on the letterhead of Intercontinental Airways Inc., for some work on a C-46-F—I notice these are "NC" and then "472." Is that a——

A. Well, "NC" means that it is a U. S. commercially licensed aircraft, and the 472, it is very common in the industry to use just the last three digits of the license number of the aircraft.

Q. Then this could refer to N-53472?

A. It does refer to that.

Q. And can you identify this as the work order on the work you were requested to do?

A. Yes.

Mr. McDonnell: I will offer this as the next exhibit in order.

The Referee: All right, Receiver's Exhibit 2.

Q. (By Mr. McDonnell): I will lay before you Invoice No. 1252 dated August 31, 1953, for \$3,352.50. It refers to Work Order 602. Is that a copy of the billing to Air America for the installation of the CO₂ system that had to be installed?

A. It is.

Mr. McDonnell: I will offer that as the Receiver's Exhibit next in evidence. [14]

Q. I will lay before you Invoice No. 1253, referring to Work Order No. 601, which is in the

(Testimony of A. W. Schwimmer.)

total amount of \$6,013.03 for repair of corrosion on Aircraft NC-53472. Is that a copy of the invoice sent to Air America in connection with the repair of the corrosion that you have discussed before?

A. Yes.

Mr. McDonnell: I will offer that as the Receiver's next in order.

Q. Finally, I lay before you a bill dated 11-20-53 for \$1,478. Now, this is billed to U. S. Air Lines, and I want to ask you if you recognize that invoice? Do you recall that matter? Let me withdraw that question and lay before you—I am sorry, counsel. You didn't see that. This is the work order. I will let you inspect that work order, Mr. Schwimmer.

A. Yes, that will help me.

Q. I will lay before you a copy of Work Order No. 600 on the letterhead of Intercontinental Airways, Inc., addressed to U. S. Air Lines, for work on NC-472. Again it is only the last three digits. Do you recall that work on Aircraft No.—well, I suppose it is 53472?

A. Yes. I believe that these engines—I am afraid this is hazy in my mind. I don't recollect that.

Q. You don't recall whether the work was done or not?

A. No, frankly I don't. I might have gone on a trip [15] or something.

Q. Do you know anybody in your organization that would know about it?

A. Mr. Dicek should know if I don't.

(Testimony of A. W. Schwimmer.)

Mr. McDonnell: All right. That is all the questions I have.

Cross-Examination

By Mr. Brennan:

Q. Mr. Schwimmer, what is your position with Intercontinental Airways, Inc.?

A. The president.

Q. And how long have you been president?

A. Since its inception, five years.

The Referee: Just a moment. Have you got a voucher of any kind for the \$1,478.06?

Mr. McDonnell: That is the matter I was going to offer but Mr. Schwimmer couldn't identify the copy or the work order. I have both copies here.

Q. (By Mr. Brennan): And who is Mr. Lutomski, who signed the work orders?

A. He was our Chief of Maintenance.

Q. I notice on both of these work orders that there is a notation there, "Credit approved," and it is initialed. Whose initials was that?

A. I don't know. What are the initials?

Q. I don't know. [16]

A. I could perhaps identify them by looking.

The Referee: Where are these initials?

The Witness: That would be on the work order, your Honor.

Mr. Brennan: That is halfway down on the other side, "Credit approved," and there is a line and initials written in.

The Witness: This could be Mr. Dicek.

(Testimony of A. W. Schwimmer.)

Q. (By Mr. Brennan): And what does that indicate? What is the significance of the approving of credit?

A. Well, just a matter of form that the work not be started by the people on the line, but in this case the work order was authorized by Mr. Lutomski, who was the Chief of Maintenance, until the credit approval had been filed.

Q. More specifically, doesn't that mean that your company undertaking this work was doing it on the credit of Air America, in reliance on the credit of Air America?

A. No, it doesn't mean any such thing. What it actually means is that there is some arrangement for this work to be done. It doesn't necessarily settle any of the conditions of how on the form itself.

Q. All right, what arrangements had been made?

A. With Air America?

Q. Yes. You mean just the ordering of the work, is that what you have in mind?

A. Yes, the work was ordered. [17]

The Referee: How about that Aviation Export matter?

The Referee: All right, go ahead, Mr. Brennan.

Q. (By Mr. Brennan): Now, were any payments made on this work that was done?

A. No, I don't believe so.

Q. Well, have you checked your records to ascertain whether or not payment was made?

A. Payment was not made.

(Testimony of A. W. Schwimmer.)

Q. Did you do any other work for Air America on this craft after it was delivered to you?

A. We did quite a bit of work on this aircraft many times.

Q. Did you do any after——

A. We were maintaining it.

Q. Did you do any work after July, 1953?

A. No, this work was the last work we did on it.

Q. Didn't you receive a payment of approximately \$10,000 from Air America after July for this work?

A. Not to my knowledge, no.

Q. Did anyone of your company give notice to Colonial Trust Company that any of this work was being performed?

A. I don't believe so. [18]

Q. Did Colonial Trust Company consent in writing or otherwise to the performance of any of this work?

A. Not to my knowledge.

Q. And as far as you know, Colonial Trust Company had no knowledge this work was being performed?

A. I had no dealings with Colonial Trust Company.

Q. As far as you know, they had no knowledge that the work was being done?

A. That is correct.

Mr. Brennan: That is all.

(Testimony of A. W. Schwimmer.)

Redirect Examination

By Mr. McDonnell:

Q. Mr. Schwimmer, when you discussed this matter with the officials of Air America, did you discuss the storage of the aircraft after the work was done?

A. No. You see, this work was finished around in August or in the early part of September, and in the early part of September I left the United States and I was gone for six months. The storage accrued after that.

Q. Do you know what the policy of your company was in connection with the storage of aircraft left on your premises after the work had been completed?

A. Yes, there is a storage charge.

Q. What is that storage charge, do you know?

A. Well, Mr. Dicek would know that better than myself. [19]

Q. And as far as you know was this work actually performed on this aircraft?

A. The work was completely done and approved by the CAA and finished and signed off on the paper work.

The Referee: You haven't proved that third item.

Mr. McDonnell: I know that, your Honor. That is all.

The Referee: You are excused.

Mr. McDonnell: I would like to call Mr. Sosnow.

W. SOSNOW

called as a witness on behalf of the Receiver, being first duly sworn, testified as follows:

Direct Examination

By Mr. McDonnell:

Q. Mr. Sosnow, were you working at Intercontinental Airways out at Lockheed during the latter half of 1953? A. Yes, sir, I was.

Q. Are you acquainted with a C-46 No. N-53472?

A. I am.

Q. Are you acquainted with the work done on that aircraft? A. I think so.

Q. Are you acquainted with some engine work done in connection with that aircraft?

A. Yes, I am.

Q. What was that work?

A. Well, when the aircraft came in it came in with [20] engines out of time, run-out engines.

Q. Would you explain to the Judge what you mean by run-out engines?

A. Well, the plane has a maximum time allowable for running the engines before an overhaul. On this plane this time had already run out.

Q. All right, go ahead. What happened then?

A. And at that time the tail corrosion was taken care of and the CO₂ system was taken care of, and the arrangement was made whereby the engines would have to be pulled anyhow for new engines to be put on, and it would also facilitate the doing of the CO₂ system. So the engines were agreed to be

(Testimony of W. Sosnow.)

taken care of, and the flight squawks were taken care of, and then all that was left to be done on the aircraft was the corrosion and the CO₂ system and the swinging of a couple of new engines.

Q. Did Intercontinental Airways in fact to your knowledge remove the aircraft engines and work off the flight squawks? A. Yes, sir.

Q. I will show you Work Order No. 600 and ask you if you can identify the signatures at the bottom of the same? A. Yes, I can.

Q. And is that the work order in connection with the removal of the engines and the flight squawks? A. That is right. [21]

Mr. McDonnell: I will offer that as the Receiver's Exhibit next in order.

I will show you a billing in the amount of \$1,478.06 and ask you if that is to your knowledge the billing for the removal of the engines and the flight squawks? A. And the outside work.

Mr. McDonnell: I will offer that.

That is all I have of Mr. Sosnow.

The Referee: All right, cross-examination.

Cross-Examination

By Mr. Brennan:

Q. To whom was your bill for that work done on the engines, and which you described as working off the flight squawks, billed?

A. Well, it should state on the invoice.

(Testimony of W. Sosnow.)

Mr. McDonnell: I will stipulate that it was billed to U. S. Air Lines.

Q. (By Mr. Brennan): Do you know why it was billed to U. S. Air Lines?

A. No, offhand I don't.

The Referee: I don't get the connection of U. S. Air Lines here, counsel. What is it? This agreement is with Air America.

Mr. McDonnell: I will offer a letter in just a moment which will clarify it. Apparently the aircraft had been under a sublease with U. S. Air Lines and through [22] inadvertence they billed U. S. Air Lines instead of Air America after it had been returned to Air America.

Q. (By Mr. Brennan): Were these engines ever returned to the aircraft?

A. No, they weren't.

Q. Are they off at this time? A. Yes.

Q. The work was not finished then? You did not complete the work?

A. We completed the removal of the engines. We weren't supposed to put new engines on until they supplied them.

Q. What did you do, overhaul these two engines for the purpose of——

A. No, they are still out there.

Q. Then I don't understand what you mean by working off flight squawks.

A. Working off flight squawks on the aircraft frame in general.

Q. You didn't do any work on the engines ex-

(Testimony of W. Sosnow.)

cept removal? A. Except removal.

Mr. Brennan: That is all.

Mr. McDonnell: That is all I have. I would like to recall Mr. Schwimmer at this time. [23]

A. W. SCHWIMMER

recalled, testified further as follows:

Direct Examination

By Mr. McDonnell:

Q. I am going to show you a letter dated November 27, 1953, on the letterhead of U. S. Air Lines, and ask you if you recognize the signature at the bottom of it? A. Yes, I do.

Q. And is that the signature of Rene Stanton?

A. Yes.

Q. And to your knowledge is he connected with U. S. Air Lines? A. He was at that time, yes.

Mr. McDonnell: I will offer that as the Receiver's Exhibit next in order.

That is all I have of Mr. Schwimmer.

Mr. Brennan: No questions.

Mr. McDonnell: That is all I have, your Honor.

The Referee: Have you anything further?

Mr. Brennan: No, your Honor.

* * *

[Endorsed]: Filed April 20, 1954, Referee. [24]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 55, inclusive, contain the original Creditors' Involuntary Petition; Order of General Reference; Approval of Debtor's Petition and of Reference Under Section 321 of the Bankruptcy Act; Petition of Reclamation of Property Order to Show Cause; Answer to Petition of Reclamation of Property; Memorandum Opinion of Referee; Findings of Fact, Conclusions of Law and Order on Petition of Reclamation of Property by Colonial Trust Company; Petition for Review of Referee's Order; Certificate on Review of Referee's Order Relative to Repair and Storage Charges on Airplane; Separate Notices of Appeal and Bond for Costs on Appeal filed Aug. 16, 1954, and September 14, 1954, respectively; Order on Petition of Colonial Trust Company for Review of Referee's Order; Statement of Points on Appeal; Designation of Record on Appeal and Stipulation and Order Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for July 15, 1954, which together with reporter's transcript of proceedings on March 30, 1954, and original Receiver's Exhibits 1 to 7, inclusive, and petitioner's exhibits 1 to 6, inclusive, transmitted herewith constitute the transcript of record on appeal to the

United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21st day of October, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14557. United States Court of Appeals for the Ninth Circuit. Colonial Trust Company, Appellant, vs. George Goggin, Trustee in Bankruptcy of the Estate of Intercontinental Airways, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 22, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14557

COLONIAL TRUST COMPANY,

Appellant,

vs.

GEORGE T. GOGGIN and INTERCONTI-
NENTAL AIRWAYS, INC., a Corporation,

Appellees.

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

The Colonial Trust Company, Appellant herein, presents herewith the points upon which it intends to rely in support of its contention that the District Court erred:

1. In holding and deciding that the debtor corporation had an equitable lien against the aircraft involved in this action.

2. In affirming the Referee's Order of June 4, 1954.

3. In failing to Order the Receiver to surrender possession of the aircraft involved to the Colonial Trust Company.

4. In failing to hold that the Colonial Trust Company is entitled to possession of the aircraft involved upon the payment of the sum of \$250.00 to the Receiver.

5. In holding and deciding that \$10,843.59 was a reasonable charge for the work performed by the debtor corporation on the aircraft involved.

6. In holding and deciding that the debtor corporation has an equitable lien against the aircraft involved in the amount of \$10,843.59, plus storage charges in an undetermined amount.

7. In holding and deciding that the Receiver of the debtor corporation shall retain possession of the aircraft until a payment is made to the estate in the sum of \$10,843.59 together with reasonable storage charges from and after September 4, 1953.

8. In finding that the Civil Aeronautics Authority of the United States required that the debtor corporation make the repairs which are the basis for its claim of lien.

Dated October 27th, 1954.

OVERTON, LYMAN, PRINCE
& VERMILLE,

By /s/ DAN BRENNAN,

Attorneys for Colonial Trust
Company, Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 29, 1954.

No. 14557

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COLONIAL TRUST COMPANY,

Appellant,

vs.

GEORGE GOGGIN, Trustee in Bankruptcy of the Estate of
Intercontinental Airways, Inc.,

Appellee.

~~REPLY~~ *OPENING*

BRIEF OF APPELLANT.

DAN BRENNAN, of
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727 West Seventh Street,
Los Angeles 17, California,
Attorneys for Appellant.

FILED

FEB 18 1955

**PAUL P. O'BRIEN,
CLERK**

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No. 14557
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

COLONIAL TRUST COMPANY,

Appellant,

vs.

GEORGE GOGGIN, Trustee in Bankruptcy of the Estate of
Intercontinental Airways, Inc.,

Appellee.

OPENING

~~REPLY~~ BRIEF OF APPELLANT.

Jurisdiction.

District Court's Jurisdiction.

The District Court obtained jurisdiction upon the filing of the "Creditors' Involuntary Petition" in bankruptcy under 11 U. S. C. Section 95 [R. 3-6]. See 11 U. S. C. Section 11, and Title 28 U. S. C. 1334. The proceeding was referred to Reuben G. Hunt, Esq., one of the referees in bankruptcy by the "Order of General Reference" of the District Court on February 3, 1954 [R. 6-7]. The appellant filed its "Petition of Reclamation of Property" to recover its aircraft which was in the possession of the Receiver, on March 11, 1954 [R. 8-10]. Appellee in its answer admitted appellant's title to said aircraft; admitted

that it had possession and that it refused to surrender same to appellant and appellee claimed that it had a lien on said aircraft for work and labor performed [R. 10-14]. The District Court had jurisdiction of the petition of the appellant by virtue of 11 U. S. C. Section 46.

Appellate Court.

The Referee held that the aircraft was subject to a lien [R. 24]. The matter was caused to be reviewed by the filing of appellant's "Petition for Review of Referee's Order" [R. 25-28]. This is an appeal from the Order of the United States District Court dated July 15, 1954 [R. 31] and from its Order of August 31, 1954, docketed and entered September 3, 1954 [R. 32-33], affirming the Order of Referee Reuben G. Hunt dated June 4, 1954 [R. 21-24]. The jurisdiction of this Court is provided for by Title 11 U. S. C. Sections 47(a) and 47(b).

Written notices of the entry of these Orders of the United States District Court were not given to the appellant and the appellant filed its notice of appeal with respect to each of said Orders [R. 31-32 and 34] within forty days from the entry thereof as provided by 11 U. S. C. Section 48(a).

Specification of Errors.

1. The Court erred in holding and concluding [R. 24] that the aircraft was subject to an equitable lien and that the amount of such lien was \$10,843.59.

2. The Court erred in holding and concluding [R. 24] that the aircraft was subject to an equitable lien for storage and that the amount of such lien could be thereafter proved up.

3. The Court erred in failing to Order the appellee to surrender possession of the aircraft to the appellant.

4. The Court erred in failing to hold that the maximum lien on the aircraft was \$250.00.

5. The Court erred in finding that the debtor corporation performed work on said aircraft of the reasonable value of \$10,843.59. This finding was in error in that the whole of the evidence [R. 38-50] is but a general report that some work was performed without any showing of the amount of time or materials spent or the value thereof from which the Court could determine the "reasonableness" of the claim.

Statement of the Case.

This appeal has grown out of a controversy between a lien claimant, the bankrupt herein, and the legal owner of an aircraft, the appellant herein. The primary question being presented by this appeal is whether the performance of work by a repairman on a registered aircraft at the request of someone other than the legal or registered owner gives rise to a mechanic's lien, legal or equitable, on the aircraft.

The one further question being presented to this Court involves the sufficiency of the evidence. This secondary issue presupposes that an equitable lien did arise in some amount. In proof of its claim of lien, the appellee produced oral testimony to describe in a general way some of the work which had been performed and justified the amount of its claim by simply introducing invoices¹ which it had rendered to certain other companies not parties to

¹Appellee's Exhibits 1 through 6.

this litigation. This Court is now asked to determine first whether this evidence was sufficient to justify a finding that the claim asserted was reasonable, and secondly whether an “*equitable lien*” was thereby created in the amount of the bankrupt’s billings.

At all times relative to this appeal the appellant has held legal title to a C-46 Curtiss-Wright aircraft bearing Civil Aeronautics Administration registration No. N53472, Serial No. 2932 [R. 22]. A certificate of title was issued by the C. A. A. on December 3, 1951, certifying the appellant to be the registered owner of this aircraft.² The appellant leased this aircraft to Air America, Inc., a corporation.³ In addition to the monthly rental the lease provided in Paragraph Fourth⁴ that Air America, Inc., would maintain this aircraft at its own expense [R. 22]. The lease prohibited subleasing the aircraft.⁵ The bankrupt performed the work in Los Angeles County, State of California, for which it claims a lien, at the request of Air America, Inc., U. S. Airlines and various individuals [R. 38-50].

It is clear from the record that the bankrupt dealt entirely with companies and/or persons other than appellant relative to the work performed on this aircraft and made no attempt to secure the written or oral consent of the appellant to the performance of this work or the lien asserted [R. 38-50]. It is also clear from the evidence, and the Court so found in finding No. VII, that the bankrupt

²Appellant’s Exhibit 3, page 1 of Appendix.

³Appellant’s Exhibit 1.

⁴See page 2 of Appendix.

⁵See page 3 of Appendix.

knew that appellant was the owner of the aircraft but did not notify appellant of the contemplated work [R. 23-24].

With the advent of bankruptcy the appellee first as Receiver and ultimately as Trustee took possession of the bankrupt's estate and appellant's aircraft. Referee Hunt ruled relative to appellant's Petition of Reclamation that the aircraft was subject to an "equitable lien" for the work performed by the bankrupt [R. 24]. Through a Petition for Review the matter was brought before Judge Westover and by an Order of August 31, 1954, appellant's Petition for Review was denied and the Order of Referee Hunt affirmed [R. 33].

Appellant would summarize the questions which are being submitted as follows:

1. Does the mere performance of work, on a registered aircraft, without the consent of the registered owner give rise to an equitable lien if such work was performed for the account of someone other than the owner and with the knowledge that such other person was not the owner?
2. Are repair invoices rendered to third parties sufficient proof of the reasonableness of the charges claimed?
3. Are repair invoices rendered to third parties sufficient proof to establish the existence of an "equitable lien" in the amount of such invoices?

ARGUMENT.

Summary.

The decision of the District Court necessitates a brief review of applicable lien law and equitable principles. Appellant will endeavor to show that the aircraft was not subject to a lien and that the District Court has in effect by-passed the law that should have governed.

The declaration of an "equitable lien" presupposes the existence of certain facts and the proper application of equitable principle to those facts. In this instance we have the mere performance of work by the bankrupt on an aircraft which was not paid for. A debt was created in favor of the bankrupt. That debt was not owed by any party to this litigation. Appellant has, through the vehicle of a lien, been saddled with that debt.

The appellant contends that the District Court erred and did so by erroneously assuming that the Court's equitable jurisdiction was the sole measure of the substantive rights involved. Appellant's view is that the District Court sitting in bankruptcy has both legal and equitable jurisdiction but that it should exercise that jurisdiction, judgment and power with due regard to both legal and equitable rights. This it has not done. Although recognizing that appellant is the legal owner of the aircraft [R. 22], the Court has denied appellant's proprietary rights.

I.

The Receiver or Trustee of a Bankrupt Acquired No Better Claim or Title Against the Aircraft Than the Bankrupt Had.

Bankruptcy Act, Sections 69 and 70, 11 U. S. C. A. 109 and 110.

In *United States v. Sampsell* (9th Cir., 1946), 153 F. 2d 731, 735, it was held that "The trustee acquires no better title than the bankrupt himself had." (There are exceptions not involved in this instance.)

II.

The Receiver or Trustee Has the Burden of Establishing the Existence of a Lien Right in the Bankrupt.

In re Clark Supply Co., Inc. (7th Cir., 1949), 172 F. 2d 363, 364, held with respect to a lien claim:

"It is not claimed that appellee did not establish clear title to the generator before it was delivered to the bankrupt. (It must be conceded that appellee had clear title to the generator before it was delivered to the bankrupt.) In such a situation the burden of proving that appellee was deprived of its title rested on appellant, or, as is stated in 20 Am. Jur. p. 140: '*It is incumbent upon one claiming a peculiar right, not common to all, given by a statute, which is given only when a prescribed state of facts exists, to show the existence of that state of facts.*'" (Emphasis added.)

III.

Under California Law the Bankrupt's Maximum Lien Is \$250.00.

Section 1208.61 of the California Code of Civil Procedure provides:

“Subject to the limitations set forth in this chapter, every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair, or safekeeping of, any aircraft, also for reasonable charges for the use of any landing aid furnished such aircraft and reasonable landing fees.”

Section 1208.62 of the California Code of Civil Procedure provides:

“That portion of such lien in excess of two hundred fifty dollars (\$250) for work or services rendered or performed at the request of any person other than the holder of the legal title is invalid, unless prior to commencing such work or service the *person claiming the lien gives actual notice to the legal owner and the mortgagee, if any, of the aircraft, and the written consent of the legal owner and the mortgagee of the aircraft is obtained before such work or services are performed.* For the purposes of this chapter the person named in the federal aircraft registration certificate issued by the Administrator of Civil Aeronautics shall be deemed to be the legal owner.” (Emphasis added.)

Section 3051 of the California Civil Code provides in part that:

“a person who makes, alters, or repairs any article of personal property, at the request of the owner, or

legal possessor of the property, has a lien on the same for his reasonable charge, for the balance due for such work done and materials furnished, and may retain possession of the same until the charges are paid;”

Section 3051(a) of the California Civil Code provides in part that:

“That portion of any lien, as provided for in the next preceding section, in excess of one hundred dollars (\$100), for any work, services, care, parking, or safekeeping rendered or performed at the request of any person other than the holder of the legal title, shall be invalid, unless prior to commencing any such work, service, care, parking, or safekeeping, the person claiming such lien shall give actual notice in writing either by personal service or by registered letter addressed to the holder of the legal title to such property, if known.”

The advent of bankruptcy does not give rise to liens where none existed under state law. *In re Hammond Interior Finish Co.* (C. C. A. 7th, 1926), 13 F. 2d 578, holds that:

“It must be conceded that the Indiana lien statutes determine the character, nature, and extent of petitioner’s lien, if any it has. Interesting as may be the study of different state statutes and the decisions of the state courts construing them, it is the Indiana lien statutes and the Indiana courts’ decisions that are decisive of the question presented to us.”

IV.

Under the Civil Aeronautics Act, Act of June 23, 1938, Ch. 601, 52 Stat. 977, 49 U. S. C., Sections 401 Through 705, Liens May Not Attach to Aircraft Without the Consent of the Registered Owner.

The Civil Aeronautics Act was reviewed at length in *In re Veterans Air Express Co.* (1948), 76 Fed. Supp. 684. The Court's opinion will serve to present the pertinent provisions of the Act and the law relative to appellant's contentions.

Briefly summarized the *Veterans' Air Express Co.* case involved the question of whether a mechanic's lien could be impressed against registered aircraft by virtue of Section 3051 (*supra*) of the California Civil Code as against a chattel mortgagee. The owner's title and the interest of the mortgagee were registered with the Civil Aeronautics Administration. Work was performed by the lien claimant subsequent to the recordation of the interest of the owner and of the mortgagee in excess of \$100,000.00. This work was performed at the request of the legal owner. The Court noted that the "consent" of the mortgagee "was not sought or obtained." The mortgagee successfully contended that since its interest in the aircraft was registered prior to the performance of the work that the lien provided for by the California law was invalid as to it.

In denying the lien claim, the Court reasoned:

"In the field of air transportation Congress early undertook to preempt the field of regulation and to deal with the entire field of activity by enactment of the Civil Aeronautics Act, Act of June 23, 1938, c. 601, 52 Stat. 977, 49 U. S. C. A. Sec. 401, *et seq.*, as amended. Section 3 of the Act, 49 U. S. C. A.

Sec. 403 states that 'There is hereby recognized and declared to exist in behalf of any citizen of the United States.' The declaration of policy stated by Congress in Section 2 of the Act, 49 U. S. C. A. Sec. 402, recites that among its purposes is the encouragement and development of civil aeronautics and 'of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense.' Under the provisions of Section 1 of the Act, 49 U. S. C. A. Sec. 401, 'operation of aircraft' or 'operate aircraft' is defined in subsection (26) as 'the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. * * *' Subsection (15) defines 'civil aircraft of the United States' as any aircraft 'registered as provided in this Act.'

"Section 501 of the Civil Aeronautics Act, 49 U. S. C. A. Sec. 521, so far as may be pertinent here, is as follows:

" '(a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or * * * to operate or navigate within the United States any aircraft not eligible for registration: Provided, That aircraft of the national defense forces of the United States may be operated and navigated without being so registered if such aircraft are identified, by the agency having jurisdiction over them, in a manner satisfactory to the Administrator of Civil Aeronautics. The Administrator of Civil Aeronautics may, by regulation, permit the operation and navigation of aircraft without registration by the owner for such reasonable periods after transfer of ownership thereof as the Administrator of Civil Aeronautics may prescribe.

“(b) An aircraft shall be eligible for registration if, but only if—

“(1) It is owned by a citizen of the United States and is not registered under the laws of any foreign country; or

* * * * *

“(c) Upon request of the owner of any aircraft eligible for registration, such aircraft shall be registered by the Administrator of Civil Aeronautics and the Administrator of Civil Aeronautics shall issue to the owner thereof a certificate of registration.

“(d) Applications for such certificates shall be in such form, be filed in such manner, and contain such information as the Administrator of Civil Aeronautics may require.’

“Finally, Section 503 of the Act, 49 U. S. C. A. Section 523, provides as follows:°

“(a) The Board shall establish and maintain a system for recording all conveyances affecting the title to, or interest in, any civil aircraft of the United States.

“(b) No conveyance made or given on or after the effective date of this section which affects the title to, or interest in, any civil aircraft of the United States, or any portion thereof, shall be valid in respect of such aircraft or portion thereof against any person other than the person by whom the conveyance is made or given, his heirs or devisee, and any person having actual notice thereof, until such conveyance is recorded in the office of the secretary of the Board. Every such conveyance so recorded in the office of the secretary of the Board shall be valid as to all persons

°49 U. S. C. A. Sec. 523(a)(1), (c) and (e) as amended in 1948 is set forth in Appendix, page 7.

without further recordation. Any instrument, recordation of which is required by the provisions of this section, shall take effect from the date of its recordation, and not from the date of its execution.

“(c) No conveyance shall be recorded unless it states the interest in the aircraft of the person by whom such conveyance is made or given or, in the case of a contract of conditional sale, the interest of the vendor, and states the interest transferred by the conveyance, and unless it shall have been acknowledged before a notary public or other officer authorized by law of the United States, or of a State, Territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.’ * * *

“Regulation 503, dealing with the recordation of aircraft ownership, is particularly pertinent here. It is as follows:

“ ‘501.1. Recordation required. All conveyances affecting the title to, or interest in, any aircraft registered under the provisions of the Civil Aeronautics Act of 1938, as amended, shall be executed upon the application form prescribed by the Administrator, or a form deemed by the Administrator to be its equivalent, and shall be recorded with the Administrator.’ ” * * *

“In view of the novelty of the question presented in this case, the Court has deemed it necessary to set forth in detail the statutory and regulatory framework of aircraft ownership and conveyance. It is clear that Congress has prescribed the only way in which aircraft may be transferred and in which liens upon aircraft may be duly recorded. In this manner, all persons dealing with aircraft are upon full legal notice concerning possible liens and are charged with the duty of inquiry at the central recording office of

the Civil Aeronautics Administration with respect to any aircraft in which they might be concerned.”⁷

If an owner of a registered aircraft in dealing with its property cannot subject the aircraft to liens without the consent of a chattel mortgagee notwithstanding state law would purport to create such a lien, does it not follow that third parties dealing with a registered aircraft having no proprietary rights therein cannot by their dealings with respect to a registered aircraft subject it to liens without the consent of the legal owner? Particularly is this so where the state law expressly provides that no lien shall arise in excess of \$250.00 without the prior written consent of the registered owner.

V.

No Equitable Lien Arose Against Appellant's Aircraft.

Equity may not, any more than the law, disregard the conditions imposed by statute upon the substance of a transaction. Presumably the bankrupt had a good claim against the several companies specifically requesting debtor's services. The imposition of a lien on appellant's aircraft unjustifiably shifts the burden to appellant.

Equity does not ignore legal rights. This is not a case involving a fraud, misrepresentation, breach of a fiduciary relationship or any other of the traditional factors normally giving rise to special equitable rights.

The District Court has found:

1. Finding I. That appellant was the legal owner [R. 22].

⁷Current regulations are contained in Title 14 of the Code of Federal Regulations. See Appendix, pages 4 to 6 for pertinent regulations currently in effect.

2. Finding II. That appellant had leased the aircraft to American Airways, Inc., by a lease providing that lessee would keep the aircraft in good repair at *lessee's expense* [R. 22].

3. Findings II and IV. That the aircraft was in need of the work performed [R. 23-24].

4. Finding III. That the work of the bankrupt was performed at the oral request of American Airways, Inc. [R. 22-23].⁸

5. Finding VII. That the bankrupt knew that appellant was the legal owner but did not notify appellant of the contemplated repairs or secure its consent [R. 23-24].

In holding that the foregoing gave rise to an "equitable lien" the District Court has substituted "equitable maxims" for legal and equitable jurisprudence and without regard to the proper application of those maxims. This is quite evident from the Court's Memorandum Opinion of May 21, 1954 [R. 14-21]. In commenting on the law the Referee stated that

"There does not appear to be any basis for a legal lien, since the provisions of Sections 1208.61 and 1208.62 of the California Code of Civil Procedure were not followed." * * *

⁸The lease referred to is Appellant's Exhibit 1. The lease is an agreement between appellant and Air America, Inc. The Court erroneously found that the lease was with American Airways, Inc. From pages 39 through 50 of the Transcript of Record it would appear that the work was orally contracted for on behalf of the aircraft by Sig Shore, Mr. Miller and Donald Rich, also known as Donald Reichgott, who were "of" [R. 39] or "president" or "major stockholder" or "chairman" of the Board [R. 40] of U. S. Airlines and/or Air America, Inc. Appellee's Exhibit 6 being Invoice No. 1550 in the amount of \$1,478.00, was billed to U. S. Airlines.

“But the question remains whether or not this Court may impress an equitable lien upon the plane even though the legal lien could not exceed \$250.00” [R. 16-17].

Under its “Conclusion” and Opinion continues:

“The bankruptcy court is not bound to follow the California law above cited when determining, as a matter of equity, what is the just and proper thing to do” [R. 20].

The result of the foregoing reasoning is a declaration that although the aircraft is not subject to a lien the bankrupt may retain possession as though one existed. If, as appellant contends, the law makes this aircraft immune from repair liens, it is not “just and proper” for that immunity to be denied an owner because of the bankruptcy of some stranger or our personal dissatisfaction with the law.

This position was stated somewhat more forcibly by the Court in *United States v. Killoren* (8 Cir., 1941), 119 F. 2d 364, 366, in discussing the jurisdiction of the bankruptcy court as follows:

“It has not, however, plenary jurisdiction in equity, but is confined, in the application of the rules and principles of equity, to the jurisdiction conferred upon it by the provisions of the Bankruptcy Act, reasonably interpreted. *Johnson v. Norris* [5 Cir.], 190 F. 459, L. R. A. 1915B, 884; *In re Kane* [7 Cir.], 127 F. 552. *The plain mandate of the law cannot be set aside because of considerations which may appeal to referee or judge as falling within general principles of equity jurisprudence.*” (Emphasis added.)

As pointed out by Judge Yankwich in *In re Quartz Crystal Products Co.* (1947), 71 Fed. Supp. 949, statutory rights of litigants “cannot be determined by general ref-

erences to bankruptcy powers” or general “equitable bankruptcy principles.”

Under California law equitable liens do not arise simply because a legal lien fails.

In *Lass v. Eliassen* (1928), 94 Cal. App. 175 at page 179, it was held that:

“Rules of equity cannot be intruded in matters that are plain and fully covered by positive statute (*Beeson v. Brotherhood of Locomotive Firemen, etc.*, 101 Kan. 399 [166 Pac. 466]). Neither a fiction nor a maxim may nullify a statute (*Harrison Machine Works v. Auferheide* (Mo. App.), 280 S. W. 711). *Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly* (*Jackson v. Torrence*, 83 Cal. 521, 537 [23 Pac. 695]).” (Emphasis added.)

Quest v. Sandman (1908), 154 Cal. 748.

Work performed by employees of a contractor does not give employee right of lien for their service where contract was between contractor and owner.

Lowe v. Woods (1893), 100 Cal. 408.

A purchaser of a horse under a conditional sales contract may not subject the horse to a livery and feed stable lien for feed and care furnished without the consent of the owner. The Court’s discussion of the case is set forth at page 412 as follows:

“Adams being the owner of the horse, without her assent Woods could not sell it; he could not pledge it; neither had he the power to create a lien upon it by placing it in the hands of an agistor. Without any contract upon appellant’s part, without any personal liability whatever, without her assent in any form, and even without any notice to her of the facts which are claimed to have created the lien, it is now sought

to take her property and apply it to the satisfaction of Wood's debt. Such a practice would be violative of the fundamental principle of law that no man's property can be taken from him without his consent."

In *Hackett v. California Laundry* (1935), 7 Cal. App. 2d Supp. 757 the Court held that a lien of a laundry for laundering household furnishings at the request of the tenant of the house is limited to \$100.00. The Court reasoned at page 759 as follows:

"Respondent, however, argues that the tenant was the agent of the owner to have the necessary laundry work done. It bases this argument on the fact that when the owner leased the furnished house to the tenant she knew that it would be necessary to have the furnishings laundered from time to time. It is of course true that the tenant had authority to have the furnishings laundered when necessary, but it does not follow that the tenant had authority to have the laundry work done for and on behalf of the owner, or on credit, in the absence of an agreement conferring such authority. Certainly the tenant had no authority to have the laundering done on the owner's credit and thereby to subject the owner's property to a lien as security therefor."

Accord:

Howard v. Societa Di Unione e Beneficenza Italiana (1944), 62 Cal. App. 2d 842.

These courts too had equitable jurisdiction.

Cal. Code Civ. Proc., Section 307.⁹

⁹Code Civ. Proc., Sec. 307. "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." Compare 11 U. S. C. A. Sec. 11(a), Courts of Bankruptcy are invested, "with such jurisdiction *at law and in equity* as will enable them to exercise original jurisdiction. * * *

VI.

**Appellee Has Failed to Prove the Reasonable Value
of the Work Performed.**

Evidence of billings rendered will not support a finding of reasonable value, *Boyd v. Ibbetson* (1928), 90 Cal. App. 298. The proper measure is the customary charges of others for similar services (20 *Am. Jur.* Sec. 386, p. 349). Evidence of billings is much less evidence of an equitable lien predicated upon equitable maxims.

Conclusion.

The “equitable lien” theory advanced by Referee Hunt and endorsed by Judge Westover ignores the law of the case. The theory overrides the law of California relative to liens and the Civil Aeronautics Act of 1938. As applied in this instance the holding declares that the mere performance of work gives rise to a lien in the amount of the artisan’s billing. Clothing the lien in equitable garments does not alter the effect of the decision appealed from.

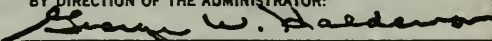
Respectfully submitted,

DAN BRENNAN, of

OVERTON, LYMAN, PRINCE & VERMILLE,

Attorneys for Appellant.

APPENDIX.

| | | | |
|---|---|------------------------|--|
| Form ACA-500.1 (8-51) | UNITED STATES OF AMERICA DEPARTMENT OF COMMERCE CIVIL AERONAUTICS ADMINISTRATION | | |
| PART A | CERTIFICATE OF REGISTRATION | | |
| 1. NATIONALITY AND REGISTRATION MARKS | 2. MAKE OF AIRCRAFT | 3. AIRCRAFT SERIAL NO. | |
| N 53472 | Curtiss-Wright | 2932 | |
| <div style="text-align: right;">16-57452-8 GPO</div> <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">Colonial Trust Company</div> <div style="font-size: small;">NAME OF OWNER</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">90 Wall Street</div> <div style="display: flex; justify-content: space-between; font-size: x-small;"> <div>ADDRESS OF OWNER</div> <div>NUMBER</div> <div>STREET</div> </div> <div style="display: flex; justify-content: space-between; margin-bottom: 5px;"> <div style="border-bottom: 1px solid black;">New York</div> <div style="border-bottom: 1px solid black;">New York</div> </div> <div style="display: flex; justify-content: space-between; font-size: x-small;"> <div>CITY</div> <div>ZONE</div> <div>STAT.</div> </div> </div> <div style="width: 35%;"></div> </div> </div> | | | |
| 6. It is hereby certified that the above-described aircraft has been duly entered on the register of the Civil Aeronautics Administration, Department of Commerce, United States of America, in accordance with the Convention on International Civil Aviation dated 7th December 1944, and with the Civil Aeronautics Act of 1938, as amended. | | | |
| DATE OF ISSUE: December 3, 1951 | BY DIRECTION OF THE ADMINISTRATOR:  CHIEF, AIRCRAFT DIVISION | | |

LEASE—PARAGRAPH

FOURTH: (a) The Company, during the continuance of this Lease shall maintain and keep all of the Trust Equipment in good order and proper repair, at its own expense, and shall replace, at its own expense, any of the Trust Equipment that may be released, worn out, unsuitable for use, lost or destroyed, by its equivalent of substantially as good material and construction and of a value equal to the value of the equipment so released, worn out, unsuitable for use, lost or destroyed, marked as in this Lease provided, the value of the new equipment to be figured at cost if that be below market value, or at market value if that be below such cost; provided, however, that the Company may in lieu of such replacement, deposit with the Trustee in cash and in trust for the benefit of the holders of the Trust Certificates pending replacement of such Trust Equipment, the then fair value of such equipment so released, worn out, unsuitable for use, lost or destroyed (such for value to be determined and any moneys so deposited to be held and applied as provided in paragraph "Seventh" of this Lease). The rights and remedies of the Trustee to enforce or to recover any of the rental payments shall not be affected by reason of such release, wearing out, unsuitableness for use, loss or destruction. The title to all equipment procured for such replacement shall be taken in the name of the Trustee, free from liens and encumbrances.

* * *

FIFTH: The Company, so long as it shall not be in default under this Lease, shall be entitled to the possession of the Trust Equipment and the use thereof.

The Company covenants to file and record this Lease and said Agreement and any supplemental Lease executed pursuant to the provisions hereof.

The Company shall not assign or transfer this Lease, or transfer or sublet (except to some company all of whose capital stock is owned by the Company) the Trust Equipment or any part thereof, without the written consent of the Trustee first had and obtained, and the Trustee agrees that it will not unreasonably withhold its written consent to any sublessee having in mind the necessity of having the planes operated by sublessees in order that Air America, Inc. obtains revenue from which it can pay the rental provided herein; nor in any case unless said assignment, transfer or sublease shall be subject and subordinate to this Lease and said Agreement; and the Company shall not, without such written consent, except as hereinbefore provided, part with the possession of, or suffer or allow to pass out of its possession or control, any of the Trust Equipment. A transfer to an airline which shall acquire all or substantially all the operations of the Company and which shall assume and agree to perform each and all the obligations and covenants of the Company hereunder and under said agreement shall not be deemed a breach of this covenant, but a transfer through insolvency or under judicial process shall be deemed a breach of this covenant. The Trustee shall have the right to declare this Lease terminated in case of any unauthorized assignment or transfer of this Lease or transfer or sublease of the Trust Equipment. The election of the Trustee to terminate this Lease under this clause shall have the same effect as the retaking of the Trust Equipment by the Trustee as hereinafter provided.

TITLE 14—CODE OF FEDERAL REGULATIONS

PART 503—RECORDATION OF AIRCRAFT OWNERSHIP

Authority: §§503.1 to 503.3 issued under sec. 205, 52 Stat. 984, as amended; 49 U. S. C. 425. Interpret or apply sec. 503, 52 Stat. 1006, as amended; 49 U. S. C. 523.

Source: §§503.1 to 503.3 appear at 13 F. R. 5310, Sept. 11, 1948.

§503.1 Basis and purpose. The purpose of this part is to prescribe regulations for recordation of conveyances affecting the title to, or any interest in, any aircraft registered under the provisions of section 501 of the Civil Aeronautics Act of 1938, as amended, and Part 501 or Part 502 of this chapter. The basis for this part is found in sections 308 and 503 of the Civil Aeronautics Act of 1938, as amended.

* * *

§503.3 Eligibility of conveyances. A conveyance shall be eligible for recordation only if:

(a) It is executed upon the form prescribed by the Administrator for such type of conveyance, or upon a form deemed by the Administrator to be its equivalent;

(b) It is accompanied by a duly executed application for registration and the required registration fee, and complies with the other provisions of either §501.4 (a) or (b) of this chapter, whichever is applicable: Provided, That this paragraph shall not apply to conveyances affecting an interest in, but not title to, the aircraft;

(c) It affects an aircraft currently registered under the terms of the Civil Aeronautics Act of 1938, as amended;

(d) It is accompanied by the required recordation fee (see §407.14 of this chapter): Provided, That this paragraph shall apply only to conveyances executed for security purposes, and not to any release, cancellation, discharge, or satisfaction thereof; and

(e) It is acknowledged before a notary public or other officer authorized by law of the United States, or of a State, Territory or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

PART 505—RECORDATION OF ENCUMBRANCES AGAINST AIRCRAFT ENGINES, PROPELLERS, APPLIANCES OR SPARE PARTS

Authority: §§505.1 to 505.3 issued under sec. 205, 52 Stat. 984, as amended; 49 U. S. C. 425. Interpret or apply sec. 503, 52 Stat. 1006, as amended; 49 U. S. C. 523.

Source: §§505.1 to 505.3 appear at 13 F. R. 5311, Sept. 11, 1948.

§505.1 Basis and purpose. The purpose of this part is to prescribe regulations for recordation of conveyances affecting the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under section 604 (b) of the Civil Aeronautics Act of 1938, as amended, for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances, and spare parts covered thereby and designate the location or locations thereof. The basis for this part is found in sections 308 and 503 of the Civil Aeronautics Act of 1938, as amended.

§505.2 Definitions. As used in this part, “conveyance” means:

(a) Any lease, mortgage, equipment, trust, contract of conditional sale, or other instrument executed for security purposes, which instrument affects the title to, or any interest in, any aircraft engines, propellers, appliances, or spare parts maintained by or on behalf of an air carrier certificated under section 604 (b) of the Civil Aeronautics Act of 1938, as amended;

(b) Any assignment, amendment, or supplement of or to any of the instruments set forth in paragraph (a) of this section; and

(c) Any release, cancellation, discharge, or satisfaction relating to any of the instruments set forth in paragraphs (a) and (b) of this section.

§505.3 Eligibility of conveyances. A conveyance shall be eligible for recordation only if:

(a) It affects aircraft engines, propellers, appliances, or spare parts maintained by or on behalf of an air carrier certificated under section 604 (b) of the Civil Aeronautics Act of 1938, as amended;

(b) It specifically describes the location or locations of the aircraft engines, propellers, appliances, and spare parts covered thereby;

(c) It is accompanied by the required recordation fee (see §407.33 of this chapter): Provided, That this paragraph shall not apply to any release, cancellation, discharge, or satisfaction relating to any conveyance recorded under this part; and

(d) It is acknowledged before a notary public or other officer authorized by law of the United States, or of a State, Territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

Section 503 of the Civil Aeronautics Act of June 23, 1938, c. 601, Title V, §503, as amended June 19, 1948, c. 523, §3, 62 Stat. 494, Title 49 U. S. C. A. §523:

“(a) The Administrator shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;”

* * *

“(c) No conveyance the recording of which is provided for by subsection (a) (1) of this section made on or after August 22, 1938, and no instrument the recording of which is provided for by subsection (a) (2) of this section or subsection (a) (3) of this section made on or after June 19, 1948, shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator. For the purposes of this subsection, such conveyance or other instrument shall take effect from the time and date of its filing for recordation, and not from the time and date of its execution.”

* * *

“(e) No conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or of a State, Territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.”

* * *

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No. 14557

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COLONIAL TRUST COMPANY,

Appellant,

vs.

GEORGE GOGGIN, Trustee in Bankruptcy of the Estate of
INTERCONTINENTAL AIRWAYS, INC.,

Appellee.

APPELLEE'S OPENING BRIEF.

Statement of Case.

This is a proceeding between the registered legal owner of a C-46 transport aircraft No. N53472 and the receiver under an unconfirmed Chapter XI proceeding. The Appellant filed a petition for reclamation of property [Tr. p. 8], to which an answer was made [Tr. p. 10] by the receiver and on which a hearing was held.

The facts as set forth in the record can be summarized as follows: The Appellant, on August 30, 1951, leased to American Airways, Inc., by written agreement, the C-46 aircraft [Tr. p. 22, Finding II]. Thereafter, the debtor corporation, through its president, A. W. Schwimmer, arranged for certain repairs, installations, etc., with

Messrs. Shore, Miller and Rich [Tr. pp. 38-39]. Thereupon, the C-46 aircraft was brought to Burbank, California, and the work performed and billed to Air America in the sum of \$10,843.59 [Tr. p. 23, Finding III].

The work not being paid for, possession of the C-46 aircraft was retained by the debtor corporation and was in its possession at the time of the commencement of the bankruptcy proceedings.

Summary of Argument.

The conclusion of the court from which no appeal has been taken was that there was no *legal* lien which could be established by the receiver in bankruptcy against the Appellant here [Tr. p. 16]. The court concluded [Tr. p. 24], however, that the debtor corporation and the receiver acting for it had an equitable lien in the sum of \$10,843.59. Thus, Appellee apprehends the issue to be:

Does the receiver have an equitable lien on the C-46 Curtis Wright aircraft?

Argument.

As indicated hereinbefore, California Code of Civil Procedure, Sections 1208.61 and 1208.62 exclude the possibility of a legal lien in this matter in excess of the sum of \$250.00 and therefore the rights of the Appellee must proceed on equitable principals.

It has long been recognized that the courts of bankruptcy are courts of equity, *In re Loose*, 52 Fed. Supp. 20; *Stegman v. Knudson* (C. C. A. 9th), 152 F. 2d 871. As courts of equity the bankruptcy courts apply equitable principals, *In re L. A. Lumber Company*, 46 Fed. Supp. 77.

This case is a peculiarly apposite one for the application of equitable principals. The Appellant is the owner of an aircraft which, according to the findings and testimony, had been operated by Air America until it had arrived at such a state that the Civil Aeronautics authority would not permit further operation whatsoever until the same had certain modifications and repairs made thereon. Under its lease agreement, Air America was obligated to keep the aircraft in an operable condition. (See appendix of Appellant's lease—Par. IV.) Accordingly, it placed the aircraft in the possession of the debtor corporation who expended time and labor upon it in the sum of \$10,-843.59, presumptively benefiting the plane to that extent and making those changes which were required so that it could be operated. Now the Appellant comes into a court of equity and brazenly seeks the delivery of the aircraft, including these improvements, the value for which no payment has ever been made, and presumes to contend that it is only liable for \$250.00 at the outside, and perhaps not even that amount.

Those who come into equity must come with clean hands and this is true in a bankruptcy proceeding as in any other equitable proceeding. (See *Serle v. Mechanics Loan and Trust* (C. C. A. 9th), 249 Fed. 942; *In re Lily Knit Silk Underwear* (C. C. A. 2d), 73 F. 2d 52.) This Appellant as petitioner below, was not prepared to render a fair and reasonable payment for the work and materials expended on its asset.

In this status of the situation, the equitable lien doctrine is available and was employed by the court to protect the rights of the debtor corporation. Equitable liens have always been favored to prevent unconscionable and equit-

able assertions of rights and to bring about just and fair results. (*In re Henshaw's Estate*, 68 Cal. App. 2d 627; *Mannon v. Pesula*, 59 Cal. App. 2d 597; *Wagner v. Sariotti*, 56 Cal. App. 2d 693; *Mortgage Guarantee Company v. Hammond Lumber Company*, 13 Cal. App. 2d 538.)

Conclusion.

The equitable lien theory employed by the Referee and affirmed by the District Judge is proper in a bankruptcy proceeding to produce an equitable result and protect the investment of time and materials of this debtor corporation which Appellant seeks to appropriate to its own benefit by contending for a narrow enforcement of legal rights alone.

Respectfully submitted,

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No. 14557

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COLONIAL TRUST COMPANY,

Appellant,

vs.

GEORGE GOGGIN, Trustee in Bankruptcy of the Estate of
Intercontinental Airways, Inc.,

Appellee.

CLOSING BRIEF OF APPELLANT.

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No. 14557

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COLONIAL TRUST COMPANY,

Appellant,

vs.

GEORGE GOGGIN, Trustee in Bankruptcy of the Estate of
Intercontinental Airways, Inc.,

Appellee.

CLOSING BRIEF OF APPELLANT.

General Statement.

With but few minor exceptions the appellant's position with reference to the points discussed in the appellee's brief has been presented in the Opening Brief of Appellant. The appellant will therefore reply only to those points specifically stressed by the appellee.

Answer to Appellee's "Argument."

In support of the judgment appealed from the appellee relies on a few general remarks concerning the equitable jurisdiction of the bankruptcy courts with a passing reference to the "clean hands" doctrine and to the principle that equitable liens are favored. The appellee makes no attempt to show why the law cited in the Opening Brief of Appellant should not control in this instance. The law of the case is summarily disposed by a remark that appellant is "contending for a narrow enforcement of legal rights alone."

In support of its "clean hands" argument appellee suggests that the appellant was not prepared to pay the claim asserted. This is not the test and it ignores the fact that it is the appellee who asserts a so-called "equitable" claim. Under Section 70 of the Bankruptcy Act, 11 U. S. C. A. 110, the trustee did not acquire any right in the involved aircraft which was not transferable by the bankrupt or leviable at law or subject to sequestration. The bankrupt's right must be measured by state law. (*Adelman v. Centaur Corporation* (C. C. A. 6), 145 F. 2d 573.) The equitable powers of the District Court are not the measure of the bankrupt's interest.

In each of the California cases cited by the appellee in support of its contention that equitable liens are favored, it will be noted that there was a contract between the property owner and the lien claimant. By virtue of the contract the property owner was in each instance personally indebted to the lien claimant and had agreed that the property in question should be subjected to that debt. The appellant in this instance was not personally indebted to the bankrupt, had not agreed that its property would be available for the payment of the bankrupt's claim. In short, there was no contractual relationship whatsoever between the appellant and the bankrupt.

In reply to appellee's comment that the appellant "brazenly seeks the delivery of the aircraft" without conceding liability for more than the statutory lien, we call the Court's attention to the rule set forth in Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 4, p. 715 to wit:

"* * * if a person lays out money on another's property with knowledge or notice of the true state of the title * * * he has no claim to be reimbursed and, of course, no lien." (Cases cited.)

In *Rosenberg v. Lawrence* (1938), 10 Cal. 2d 590, at 594-595, it was declared that:

“While a court of equity may exercise broad powers in applying equitable remedies, it may not create new substantive rights under the guise of doing equity.”

When leasing its aircraft, the appellant was assured by the substantive law that without its consent its aircraft could not be subjected to repair liens in excess of rather nominal amounts. Not having consented to the imposition of liens in excess of these statutory amounts, the appellant's proprietary rights should not be divested by the technique of a loose application of otherwise salutary concepts. When the debtor corporation performed the work for which it seeks payment, it knew that under the substantive law it must look to the companies or persons with whom it had contracted. It knew specifically that the aircraft was subject only to a rather nominal statutory lien in the absence of “written consent” of the appellant. The debtor did not solicit appellant's consent much less obtain it. The appellee is hardly therefore in a position to urge now that the appellant is “brazen”, or has “unclean hands”, or is asserting “unconscionable rights”.

Conclusion.

The decision appealed from constitutes a substantial and material rewrite of the lien law of the State of California and should be reversed.

Respectfully submitted,
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No. 14,558

United States Court of Appeals
For the Ninth Circuit

HENRY THOMAS,

Appellant,

VS.

HARLEY O. TEETS, as Warden of the
California State Prison at San
Quentin, California,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLEE'S BRIEF.

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United States Court of Appeals For the Ninth Circuit

HENRY THOMAS,

Appellant,

VS.

HARLEY O. TEETS, as Warden of the
California State Prison at San
Quentin, California,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

On August 29, 1951, two days before the date set for his execution, petitioner applied for a writ of habeas corpus in the United States District Court. This petition was denied on August 30, 1951. (See Tr. Cir. Ct. 13134, R. 13.)

On August 31, 1951, Thomas applied to William Denman, Chief Judge, United States Court of Appeals, for a certificate of probable cause and for stay of execution pending appeal from the order of the

District Court denying the writ of habeas corpus. The certificate and stay were granted. (*Thomas v. Duffy*, 191 F. 2d 360.) On the same date a notice of appeal and an amended notice of appeal were filed by counsel appointed by Judge Denman. (R. 18, 19.)

This Court reversed the order dismissing the petition and ordered the District Court to entertain the petition on the merits. (*Thomas v. Teets*, 205 F. 2d 236.)

On May 19 and 20, 1954, the United States District Court, Judge Harris presiding, heard evidence on behalf of the petitioner and the respondent. (T. 15.)

On August 7, 1954, Judge Harris dismissed the petition and discharged the writ. (T. 21-23.)

A certificate of probable cause and stay of execution was granted by Judge Harris (T. 26) and a notice of appeal was duly filed. (T. 28.)

STATEMENT OF FACTS.

1. Facts recited in the petition.

The petition for the writ of habeas corpus which was subsequently utilized as a traverse to the return alleged the following facts:

(a) The sheriff told appellant that he did not have a chance if he went before a jury, that if he pleaded guilty the judge would give him a life sentence, that if appellant did not cooperate he (the sheriff) might let word get around and some people might not wait for a trial but might come and string him up, and

that if he cooperated and did like the sheriff said and plead guilty and not cause anybody any trouble he (the sheriff) would promise to get appellant life;

(b) The attorney appointed by the trial Court to represent him told appellant that he heard about appellant's case, that appellant was guilty, that the only thing for appellant to do was to plead guilty, that if appellant went before a jury he would be sure to get gassed, that if he pleaded guilty he (the attorney) thought the judge would give appellant life, that he (the attorney) knew the judge, would talk to the judge and that the judge would surely give appellant life if he pleaded guilty and saved everybody a lot of trouble and the county the expense of a jury trial;

(c) In reliance upon these promises of the sheriff and the attorney, appellant kept his mouth shut;

(d) The court-appointed attorney, on the day set for the entry of appellant's plea, went into the judge's chambers (without appellant) with the district attorney during a recess and after they emerged therefrom appellant was told by the district attorney in the presence of his attorney that if appellant fought the case he (the district attorney) was going to get appellant gassed, but that he would not ask the judge to gas him if he pleaded guilty, and appellant's attorney nodded his head that was what would happen;

(e) Appellant did not learn what had transpired in the judge's chambers until after his automatic appeal to the Supreme Court of the State of California and not until he had sent for and received a transcript of the proceedings;

(f) In the session held in the judge's chambers in the absence of appellant, the judge told appellant's attorney that he would give appellant the gas if he pleaded guilty;

(g) Appellant's court-appointed attorney never said a word to him in court as to what had transpired in chambers and never told him that the judge had so warned the attorney;

(h) Appellant only pleaded guilty because he was promised life and scared out of pleading not guilty and that had he known the true facts he would have had a jury trial;

(i) Not one word was uttered in his behalf throughout the proceedings.

2. Facts determined at the hearing.

The evidence at the hearing included the transcript of the proceedings in the California Superior Court in reference to petitioner's guilty plea, and the testimony of Henry Thomas, the petitioner, Mark Brawman, the Court-appointed attorney for petitioner, Ben Richardson, the sheriff, and Raymond McCarthy and Kent Horton, Special Agents of the California Department of Justice.

Resolving conflicts in the testimony in favor of the trial court's determination we have the following set of facts:

Ben Richardson, who was sheriff of Siskiyou County at the time of Thomas' arrest and plea, testified that he did not tell Thomas to cooperate or he would be strung up, nor did he make any statements to

that effect. (R.T. 139-140.) Richardson did not tell Thomas that he had no chance with a jury or that if he had a jury he couldn't miss getting gassed. (R.T. 140.)

Mark Brawman, Thomas' attorney, testified that after being appointed counsel he read the transcript of the preliminary hearing and then held a conference with his client. (R.T. 90:21.)

Brawman asked Thomas about his case. Thomas told him that he was guilty. Brawman then asked him to simply tell what happened, give the facts, and that he, Brawman, could draw his own conclusions as to whether or not Thomas was guilty. Thomas then proceeded to tell what happened. (R.T. 91:6-15.) Thomas stated that he and one Willie McCain had discussed pulling a stickup or holdup, that they procured some pistols, and drove to a store near Tule Lake. Mr. Brawman was not sure whether Thomas stated that they entered the store with the pistols in their hands. Willie McCain got in a scuffle with the man in the store, the pistol that McCain had was discharged. Thomas stated that when he heard the shot he got excited and pulled the trigger, but that he didn't intend to kill Mrs. Ainsworth. (R.T. 92.)

Mr. Brawman further asked him about the confession he had made to the officers. He asked whether the officers had abused or mistreated him in any way. Thomas stated that he had not been in fear in any way at the time he gave his statement. Thomas stated that the officers had treated him well. Mr. Brawman told him at this time that the only question that would

jury to find him guilty, but that he could feel sure that he would be found guilty of murder.

“I went on to explain to him that in addition to that it required the unanimous verdict of the jury as to the punishment, whether it would be life imprisonment or the death penalty. I told him that that was where the odds were in his favor because if there happened to be one person on the jury who did not want to give the death penalty, why, it would be possible that he would not receive the death penalty, that all we would have would be life imprisonment.

“I also told him that he must realize his position in this case, that is, that he was a colored man, he was charged with shooting and killing a white woman in the perpetration of a robbery and this was one of the cow counties of Siskiyou County, that it is hard to tell whether a jury would be prejudiced against him because he happened to be a colored man. That is why I wanted his opinion as to what he would like to do; although I again repeated that it was *my advice to plead him not guilty* and stand trial before a jury, that that did not mean that he would be acquitted of the charge, but simply that he would have a chance of escaping the death penalty.

“I might say, yet, that Mr. Thomas, all the times that I talked to him, gave me the impression of being a very intelligent person. . . . That is why I asked him to think about it, and he did. He sat there with his head down and I could see that he was reflecting and thinking very deeply of it.

“ . . . Mr. Thomas didn't reply to that but he still was silent, he was thinking. Finally he said,

‘Well, I might just as well get it over. ’ He said, ‘I might just as well go in and plead before the judge.’

“I said, ‘Well, that is what you want to do, it’s all right, because I can’t tell you not to do that and then plead guilty before a jury.’

“And if a jury should impose the death penalty, why, then, I just wouldn’t know what to do about it, I would feel bad. I didn’t tell him that, really, but that is what was in my mind, that I would feel bad about it, that I had advised him after he had wanted to plead before the judge.

“However, when he stated that he wanted to plead before the judge, I again told him that was not my advice, but that I did not feel that I should overrule his decision because of the thing that was involved, that it was his life. I told him that it was his life that was in the balance, I wanted him to make the decision which way it should go.” (R.T. 96-99. Also see R.T. 118, 119.)

The sheriff who was present at this conference substantiated the testimony of Brawman. Richardson testified that Mr. Brawman told Thomas that the judge was not in a receptive mood for a guilty plea and that such a plea would probably not get any consideration from the Court. (R.T. 138:1; 139:3.)

Thomas admitted that he knew that he was charged with having shot and killed the lady in the store. He knew that he entered a plea of guilty to that charge. He knew at the time he entered the plea of guilty, that murder was punishable by either death or life imprisonment. He was aware that one of the punish-

ments prescribed by law for murder was death at the time of his plea. (R.T. 56-57.)

The defendant entered a plea of guilty. At the time set for determining the degree of the offense, Mr. Ainsworth the husband of the deceased woman, testified to the fact of the robbery-murder. The defense counsel declined to cross-examine because the story of Mr. Ainsworth was as the defendant told it to the defense counsel. (R.T. 115:22.)

At this time the Court stated, "That is all." This action on the part of the Court was one of the grounds urged on appeal to the California Supreme Court. (R.T. 124:19-23.)

Mr. Raymond McCarthy, Special Agent for the California Department of Justice, testified that he and the sheriff returned Mr. Thomas and Willie McCain to Siskiyou County. (R.T. 146:23.)

During the course of this trip Thomas asked McCarthy whether a plea of guilty by Thomas would assist McCain in his case, inasmuch as McCain had just recently been married and he (Thomas) had no burdens to be contended with. (R.T. 147:12.) McCarthy stated that he didn't know how the Court would accept such a plea. (R.T. 147:19.)

SUMMARY OF ARGUMENT.

I.

The evidence clearly supports the District Court's determination that petitioner's plea was not induced by threats of lynching or promises by the sheriff.

II.

The evidence clearly supports the District Court's determination that 'Thomas' counsel fully advised him of the purport of the judge's statements in the chamber prior to his plea.

III.

The question concerning the trial judge precluding defense counsel from introducing mitigating circumstances was properly resolved by the District Court.

IV.

The District Court ruled correctly on the question of the alleged incompetency of counsel.

ARGUMENT.

I.

THE EVIDENCE CLEARLY SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT PETITIONER'S PLEA WAS NOT INDUCED BY THREATS OF LYNCHING OR PROMISES BY THE SHERIFF.

Petitioner alleged that his plea of guilty was coerced, induced by threats of the sheriff. He alleged that the sheriff threatened him with a lynching unless he cooperated and entered a plea of guilty. Petitioner also alleges that the sheriff promised to obtain a life sentence for the petitioner if he entered a plea of guilty.

Thomas testified to these facts at the hearing. The statement by counsel for petitioner that there were

some conflicts between the testimony of Thomas and the testimony of the witnesses for respondent is an understatement.

Sheriff Richardson stated he at no time had threatened the defendant that he must cooperate or be strung up. Richardson made no statements at all to that effect. (R.T. 139-140.)

Richardson did not tell Thomas that he had no chance with the jury or that if he had a jury he couldn't miss getting gassed. (R.T. 140.)

Likewise Sheriff Richardson did not tell Thomas to keep his mouth shut, or did he tell him that he (Richardson) would talk to the judge and try to get Thomas a life sentence. (R.T. 140.)

That Sheriff Richardson did not make such promises, statements, or threats is clearly shown by the record. (R. 139-140.)

II.

THE EVIDENCE CLEARLY SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT THOMAS' COUNSEL FULLY ADVISED HIM OF THE PURPORT OF THE JUDGE'S STATEMENTS IN THE CHAMBER PRIOR TO HIS PLEA.

Petitioner alleged and Thomas testified that his attorney did not inform him of the judge's statement in the chamber that he would be inclined to give the death penalty whether or not a plea were entered.

The evidence clearly shows that the defendant was advised of the purport of the judge's statement to the

effect that he was inclined to give the death penalty, though the judge would not commit himself definitely.

Further, petitioner was fully advised of his rights to a jury trial and of the fact that one juror could prevent conviction and that one juror could block the death penalty. (R.T. 97:20.) In fact petitioner's counsel had at this time advised him not to enter a plea of guilty, but stated that the decision was for Thomas to make. (R.T. 98:10.)

The testimony also shows that petitioner Thomas had previously indicated that he wanted to enter a plea of guilty. He asked Mr. McCarthy, the Special Agent who transported him back to Siskiyou County, whether a plea of guilty would help McCain, Thomas' co-defendant, with his case, since McCain was just recently married and he (Thomas) didn't have a like burden. (R.T. 147:12.)

Thus, the evidence clearly shows that defendant was advised of the judge's statement in the chamber concerning his inclination to give the death penalty, and that he was advised as to his right and possible chances before a jury. Thus, it appears that Thomas, on being fully informed of the judge's attitude and his rights to a jury, voluntarily and of his own free will entered a plea of guilty.

III.

THE QUESTION CONCERNING THE TRIAL JUDGE PRECLUDING
DEFENSE COUNSEL FROM INTRODUCING MITIGATING CIR-
CUMSTANCES WAS PROPERLY RESOLVED BY THE DIS-
TRICT COURT.

1. The question of the trial judge's alleged preclusion of defense counsel was not before the District Court in this proceeding.

The petition does not allege a violation of due process based upon the preclusion of defense counsel from presenting mitigating circumstances at the hearing to determine petitioner's sentence.

Even assuming it was properly raised by the petition, the District Court properly exercised his discretion in dismissing this allegation. This could be properly based on the fact that the State Supreme Court determined this question on the record. See *People v. Thomas*, 37 Cal. 2d 74. A District Court may properly rely upon the record and determination by a state Court. See *Brown v. Allen*, 344 U.S. 443, 463, 503-507.

Furthermore, this Court determined that the petition stated a cause for relief on the theory that the sheriff induced the guilty plea by threats and promises and that the participation of defense counsel did not operate as an insulator between the sheriff's conduct and the plea. This resulted from the defense counsel's alleged failure to inform petitioner of the judge's statements concerning the death penalty. *Thomas v. Teets*, 205 Fed. 2d 236. Thus the only question before the District Court was whether petitioner's plea was induced by the sheriff's statements and further encouraged by defense counsel's failure to inform peti-

tioner of the judge's attitude. These questions have been resolved against petitioner upon the evidence.

2. The trial judge was fully informed of the circumstances of the shooting.

The judge stated in the conference at the judge's chamber that he had read the transcript of the preliminary examination. (R.T. 49.) This transcript contained references to the scuffle between McCain, petitioner's co-defendant, and the store owner, the shooting by McCain, and the subsequent shooting by petitioner.

Furthermore, Brawman, petitioner's defense counsel, testified that he had informed the judge of these facts in his first conference and further that he had informed him that when Thomas heard the shot from McCain's gun, Thomas got excited and pulled the trigger, but did not intend to shoot anyone. (R.T. 117:9-17.)

Thus it appears that the judge was in fact fully informed of mitigating circumstances.

IV.

THE DISTRICT COURT RULED CORRECTLY ON THE QUESTION OF THE ALLEGED INCOMPETENCY OF COUNSEL.

1. The question of incompetency of counsel was not before the District Court.

The petition, which later became the traverse, does not contain an allegation that petitioner was denied due process by reason of incompetent counsel. This

is an allegation which petitioner's counsel seeks to read into the traverse as an afterthought.

The allegations of the petition, presently the traverse, have been before this court. This court determined that the allegations of the petition stated a cause for relief on the theory that the threats and promises of the sheriff induced the guilty plea. This court further stated that the alleged concealment by defense counsel of the statement of the judge that he would be inclined to give the death penalty, was "an answer to the possible contention that the act of the sheriff was not the proximate cause of Thomas' plea of guilty. . . ." *Thomas v. Teets*, 205 Fed. 2d 236.

This decision is the law of the case and determinative of the effectiveness and interpretation of the allegations of petitioner's traverse.

2. Petitioner's argument concerning incompetency of defense counsel is without merit.

(a) Defense counsel fully informed the trial judge of the circumstances of the killing.

Defense counsel, Mr. Brawman, testified that he did not cross-examine Mr. Ainsworth at the hearing to determine the degree of the offense since his testimony coincided with Thomas' story. (R.T. 115:22.)

Defense counsel further stated he felt he was precluded from adding anything by the judge's remark that he had heard enough.

Nevertheless, in a prior conversation with the judge defense counsel had pointed out to the judge that a scuffle occurred between McCain and Mr. Ainsworth,

that McCain's gun was discharged, and that this excited Thomas and he pulled the trigger of his gun but did not intend to shoot or to kill anyone. (R.T. 117: 9-17.)

(b) The record does not establish that defense counsel's representation was a farce, a sham, or a mockery of justice.

Petitioner would lead one to believe that any action of defense counsel, which can be termed a mistake in light of omniscient hindsight, establishes incompetency of counsel and a violation of due process.

The proper rule is that the representation of counsel, if it is to be of such low caliber as to amount to a lack of due process, must be such that the trial is a farce, a sham, and a mockery of justice.

Discussing the requirement of counsel, Mr. Justice Minton, in *U. S. v. Ragan*, 7 Cir. 1948, 166 F. 2d 976, 980, pointed out that petitioner's counsel was an old man and that there was considerable evidence of inefficiency. Mr. Justice Minton stated as follows:

"Whenever the Court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise, he would not be in good standing at the bar and accepted by the Court. The constitutional requirements have been met as to the necessity of counsel. If the action of counsel in the presence of the Court in the conduct of the trial reduces the trial to a travesty of justice, such action might be considered on the presumption that such a trial was a denial of due process. The

conduct of counsel in the trial of a case is that of only one of the officers of the Court whose duty it is to see that the defendant receives a fair trial. He is only one of the actors in the drama. The best of counsel makes mistakes. His mistakes, although indicative of lack of skill, or even incompetency, will not vitiate a trial unless on the whole representation is of such low caliber as to amount to no representation and reduce the trial to a farce. A fair appraisal of the record in this case does not remotely approach such a state."

This statement of the rule is essentially followed in the following cases.

Diggs v. Welch (D.C. 1945), 148 F. 2d 667; *Merritt v. Hunter* (10th Cir. 1948), 170 F. 2d 739; *Morton v. Welsh* (4th Cir. 1947), 162 F. 2d 890; *Carmody v. Cox* (8th Cir. 1943), 138 F. 2d 786; *Dorsey v. Gill* (D.C. 1945), 148 F. 2d 857.

Some of the reasons for this rule were discussed in *Diggs v. Welch*, supra, p. 669.

"The result of such an interpretation would be to give any federal prisoner a hearing after his conviction in order to air his charges against the attorney formerly representing him. It is well known that the drafting of petitions for habeas corpus have become a game in many penal institutions. Convicts are not subject to the deterrence of prosecution for perjury and contempt of Court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. . . . To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that

phrase is to give every convict the privilege of opening a pandora's box of accusations which trial courts near large penal institutions would be compelled to hear. . . . For these reasons we think absence of effective representation of counsel must be strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it. . . . They are all cases where the circumstances surrounding the trial shock the conscience of the court and made the proceedings a farce and a mockery of justice." (P. 470.)

The facts in the present case certainly do not indicate that Thomas' trial was a farce or a mockery of justice. Defense counsel testified that he did not cross-examine Mr. Ainsworth because Mr. Ainsworth told the identical story that Thomas had told him. Further it appears that defense counsel was aware of the fact the judge had read the preliminary examination and was familiar with the mitigating circumstances in this case. Furthermore, it appears that the defense counsel had related to the trial judge the mitigating circumstances in a conference with the judge. He told the judge that there was a scuffle between McCain and Ainsworth and McCain's gun went off and as a result Thomas got excited and pulled the trigger of his gun. The judge was informed that Thomas did not intend to shoot or kill anyone.

The district judge properly concluded that this question was not before the District Court, and that if it were before the District Court, it was unmeritorious.

CONCLUSION.

For the foregoing reasons we respectfully submit that the discharge of the writ of habeas corpus be affirmed.

Dated, San Francisco, California,
February 4, 1955.

EDMUND G. BROWN,

Attorney General of the State of California,

CLARENCE A. LINN,

Chief Assistant Attorney General of the State of California,

ARLO E. SMITH,

Deputy Attorney General of the State of California,

Attorneys for Appellee.

No. 14559

United States
Court of Appeals
for the Ninth Circuit

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review Decisions of The Tax Court
of the United States

FILED

FEB 15 1955

PAUL P. O'BRIEN,
CLERK

No. 14559

United States
Court of Appeals
for the Ninth Circuit

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review Decisions of The Tax Court
of the United States

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| Opinion, Memorandum | 43 |
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| Exhibit A—Notice of Deficiency | 8 |
| Petition for Redetermination of Deficiency (Docket No. 47798) | 13 |
| Exhibit A—Notice of Deficiency | 18 |
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| Exhibit 10-J—Letter dated Nov. 3, 1947, from Headquarters of Alaskan Service Base signed by W. I. Waugaman, Major, which Incorporated a copy of Decision “N” dated Aug. 15, 1947 | 33 |
| Exhibit 11-K—Decision of the United States Department of the Interior, Bureau of Land Management, dated May 3, 1948..... | 36 |
| Statement of Points to be Relied Upon (USCA) | 57 |
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| Exhibit P—Permit issued by the Department of Interior to the United States Army to Mine Coal in Fairbanks, April 5, 1946..... | 39 |

APPEARANCES

For Petitioners:

A. R. KEHOE, Esq.

For Respondent:

GORDON N. CROMWELL, Esq.

Docket No. 47797

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

5/10/54—Transferred from Judge Oppen to Judge
Murdoch, (Div. 3).

DOCKET ENTRIES

1953

Apr. 13—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 14—Copy of petition served on General Counsel.

Apr. 13—Request for Circuit hearing in Seattle, Wash., filed by taxpayer. 4/16/53—Granted.

May 11—Answer filed by General Counsel.

May 18—Copy of answer served on Taxpayer, Seattle, Wash.

July 22—Hearing set October 13, 1953, Seattle, Wash.

1953

Oct. 16—Hearing had before Judge Oppen on the merits. Stipulation of Facts filed. Motion to consolidate with Docket No. 47798 filed, granted and served. Briefs due 12/21/53; Replies due 1/11/54.

Dec. 7—Transcript of Hearing 10/16/53 filed.

Dec. 11—Brief filed by taxpayer.

Dec. 21—Motion for extension to Jan. 21, 1954, to file brief, filed by General Counsel. 12/23/53-Granted.

1954

Jan. 21—Motion for extension to Feb. 20, 1954, to file brief, filed by General Counsel. 1/25/54-Granted.

Feb. 17—Brief filed by General Counsel.

Feb. 17—Copy of brief served on General Counsel.

Mar. 9—Reply brief filed by General Counsel.

Mar. 11—Reply brief filed by taxpayer. Copy served.

June 30—Memorandum Opinion filed. Judge Murdock. Decision will be entered for the respondent. 7/1/54-Copy served.

July 6—Decision entered. Judge Murdock. Div. 3.

Sept. 22—Petition for review by U. S. Court of Appeals for the Ninth Circuit filed by petitioner.

Sept. 23—Proof of Service filed.

Sept. 23—Designation of contents of record with proof of service thereon filed by petitioner.

Docket No. 47798

EMIL USIBELLI,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

[Printer's Note: Docket Entries and Appearances in Docket No. 47798 are identical to Docket Entries and Appearances in Docket No. 47797 except for the following:]

1953

May 11—Request for Hearing in Seattle, Wash.,
filed by General Counsel.

The Tax Court of the United States

Docket No. 47797

EMIL USIBELLI and ROSE P. USIBELLI,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named Petitioners hereby petition for a redetermination of the deficiency proposed by the Commissioner of Internal Revenue in income tax for the calendar year 1948, the Notice of Deficiency bearing date of December 19, 1952, Bureau Symbols ADC:App:S:90D, and as a basis for this proceeding allege as follows:

I.

The Petitioners are individuals, husband and wife, residing at Suntrana, Alaska. The income tax return which is involved in this proceeding is that of petitioners for the calendar year 1948. A joint return was filed by them with the Collector of Internal Revenue, Tacoma, Washington.

II.

On December 19, 1952, Respondent mailed Petitioners, at their residence, Suntrana, Alaska, a notice determining a deficiency in income taxes for the calendar year 1948 in the amount of \$5,648.24, substantially all of which amount is in dispute herein. A copy of said notice of deficiency, together with a statement covering same, is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

III.

In determining such deficiency, Respondent erred in the following respect:

(a) In disallowing a depletion deduction of \$8,026.71.

IV.

The facts upon which Petitioners rely in support of the foregoing assignment of error are as follows:

(a) The Petitioner Emil Usibelli operates a coal mine in Alaska. He first began his coal mining operations in Alaska in the year 1943, and has continued to the present time. On April 5, 1946, the Secretary of the Interior, under Fairbanks Serial 06089, granted the United States Army special per-

mission to mine coal from the following land in Alaska:

S $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 19, NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 20, T. 125, R. 6 W., F. M., Alaska.

The permit provided that the Army might contract for mining of coal by private parties providing the contractor filed a \$10,000 bond conditioned upon proper mining in accordance with operating regulations satisfactory to the Geological Survey representative. The Army's permit, unless otherwise terminated, was to expire six months after the cessation of hostilities "in the present war", as determined by proclamation of the President or concurrent resolution of the Congress. Emil Usibelli held contracts for mining coal with the Army, and on June 24, 1946, he filed a satisfactory \$10,000 bond executed by the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety.

The President by Proclamation 2714 of December 31, 1946, proclaimed cessation of hostilities of World War II, effective 12:00 o'clock noon on the same date.

On May 20, 1947, the Army filed a petition for extension of the permit, Fairbanks Serial 06089, and for its amendment to include as additional lands the following described subdivisions:

T. 125, R. 6 W., F. M., Alaska

Sec. 16, SW $\frac{1}{4}$

Sec. 17, S $\frac{1}{2}$

Sec. 18, SE $\frac{1}{4}$

Sec. 19, N $\frac{1}{2}$ NE $\frac{1}{4}$

Sec. 20, N $\frac{1}{2}$ NW $\frac{1}{4}$

On May 21, 1947, Emil Usibelli filed coal lease application, Fairbanks Serial 06561, embracing all of the lands included in the May 20, 1947 permit application of the Army, with the exception of the Southwest Quarter of Section 16. This application was filed with the United States Department of Interior, Bureau of Land Management. The Army advised the Department of Interior, Bureau of Land Management, that it was willing that its permit be cancelled when Mr. Usibelli's application was granted, but it requested that its permit be meanwhile extended in order that no time elapse between the expiration of its permit and the issuance of Mr. Usibelli's coal lease under application Fairbanks Serial 06561.

On August 15, 1947, the Department of Interior, Bureau of Land Management, granted the request of the Army in its application of May 20, 1947, extending their permit from June 30, 1947 covering the additional lands applied for, until the effective date of a lease which might be issued for the land to Emil Usibelli, subject to the filing by Usibelli of the written consent of the United States Fidelity & Guaranty Company of Baltimore, Maryland, to the amendment and the extension of the permit and its agreement to remain bound under its bond, or under a new and satisfactory \$10,000 bond.

On August 26, 1947, Emil Usibelli filed a request that his application for coal lease be amended to include as additional land the Southwest Quarter of Section 16.

The Department of the Interior granted Emil Usibelli his lease on or about April 1, 1949, the Army permit continuing to that date.

Emil Usibelli had various contracts for the sale of coal to the Army during the time he was conducting his coal mining operations in Alaska. On July 1, 1947, he entered into Contract No. WOO-017-qm-1, a negotiated contract with the Army, providing for the sale to the Army of 45,000 tons of sub-bituminous mine run coal at \$5.22 a ton, 25,000 tons of sub-bituminous lump nut coal at \$6.22 a ton, and 30,000 tons of sub-bituminous steam and stoker coal at \$6.22 a ton. Emil Usibelli worked under this contract during the years 1947 and 1948. The coal supplied to the Army under this and other contracts during the years 1948 and 1949 was mined on the property included in the Army's permit, Fairbanks Serial 06089, and in Usibelli's application, Fairbanks Serial 06561, Usibelli's mining rights being granted under a continuing special permit pending the issuance of the April 1, 1949 permanent lease.

Petitioners were entitled to depletion in their coal mining operations under the facts outlined above during the years 1947 and 1948.

Wherefore, Petitioners pray that this Court hear and determine this proceeding, and find that Petitioners properly reported their income tax in their return for the calendar year 1948, and properly paid their tax thereon, and that this Court deter-

mine such other and further relief as may be proper in the premises.

/s/ A. R. KEHOE,

Counsel for Petitioners

Duly Verified.

EXHIBIT "A"

1215 Smith Tower Building
Seattle 4, Washington

ADC:App:S:90D—S:DM

Dec. 19, 1952

Mr. Emil Usibelli
Mrs. Rose P. Usibelli
Suntrana, Alaska

Dear Mr. and Mrs. Usibelli:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1948 discloses a deficiency of \$5,648.24 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 150 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for the redetermination of the deficiency. In counting the 150 days you may not exclude any day unless the 150th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 150th day. Otherwise Saturdays, Sundays, and legal

holidays are to be counted in computing the 150-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Assistant District Commissioner, Appellate, 1215 Smith Tower, Seattle 4, Washington. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

John S. Graham,

Acting Commissioner of Internal
Revenue

/s/ By J. B. Harlacher,

Asst. District Commissioner,
Appellate

Enclosures: Statement, Form 1276, Agreement
Form—DMitchell:hvs.

ADC:App:90D—S:DM

Statement

Emil and Rose P. Usibelli, Husband and Wife,
Suntrana, Alaska.

Tax liability for the taxable year ended December 31, 1948:

| Year | Kind of Tax | Deficiency |
|------|-------------|------------|
| 1948 | Income | \$5,648.24 |

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated January 11, 1951; to your protest dated May 5, 1951; and to the statements made at the conferences held on August 8, 1952 and September 15, 1952.

A copy of this letter and statement has been mailed to your representative, Mr. Vernon L. Maxfield, White Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1948

ADJUSTMENTS TO NET INCOME

| | |
|---|-------------------------|
| Net income as disclosed by return..... | \$48,850.40 |
| Additional income and unallowable deductions: | |
| (a) Depletion | \$8,026.71 |
| (b) Additional salary accrued | 2,594.19 10,620.90 |
| <hr/> | |
| Net income adjusted | \$59,471.30 |

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that you had no economic interest in the coal in place that was being mined in 1948 for the United States Army under certain contracts. Therefore, percentage depletion claimed in the amount of \$8,026.71 is disallowed.

(b) It has been determined that your income tax return for 1948 was required to be made on the accrual basis, and that the total salary liability accrued to Emil Usibelli in 1948 by the Usibelli Coal Mine, Inc., was \$12,000.00. As there was reported on the return only \$9,905.81 from such source, your income has been increased by \$2,594.19 to correct.

| | |
|--------------------------------|-------------|
| Net income | \$59,471.30 |
| Less: Exemptions | 2,400.00 |
| <hr/> | |
| Net income subject to tax..... | \$57,071.30 |
| <hr/> | |

Joint return computation:

| | | |
|--|-------------|----------|
| Half of net income subject to tax..... | \$28,535.65 | |
| Tentative tax | \$12,312.10 | |
| Less: Reduction | | |
| 17% of \$400.00 | \$ 68.00 | |
| 12% of \$11,912.10 | 1,429.45 | 1,497.45 |
| Tentative normal tax and surtax..... | \$10,814.65 | |
| Combined normal tax and surtax (2 x \$10,814.65) | \$21,629.30 | |
| Income tax liability | \$21,629.30 | |
| Income tax liability disclosed by the return, original account No. 6-329029 | 15,981.06 | |
| Deficiency of income tax | \$ 5,648.24 | |

[Endorsed]: T.C.U.S. Filed April 13, 1953.

[Title of Tax Court and Cause No. 47797.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph I of the petition.
2. Admits the allegations contained in paragraph II of the petition.
3. (a) Denies that the Commissioner erred in his determination of the deficiency as shown by the

notice of deficiency from which the petitioners' appeal is taken. Specifically denies that he erred in the manner and form as alleged in subparagraph (a) of paragraph III of the petition.

4. (a) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in subparagraph (a) of paragraph IV of the petition.

5. Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that petitioners' appeal be denied and that the Commissioner's determination be approved.

/s/ CHARLES W. DAVIS, JOD
Chief Counsel, Bureau of
Internal Revenue

Of Counsel: Wilford H. Payne, District Counsel;
John H. Pigg, Appellate Counsel; John O. Durkan, Assistant Appellate Counsel; Gordon N. Cromwell, Special Attorney, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed May 11, 1953.

The Tax Court of the United States

Docket No. 47798

EMIL USIBELLI, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency proposed by the Commissioner of Internal Revenue in income tax for the calendar year 1947, the Notice of Deficiency bearing date of December 19, 1952, Bureau Symbols ADC:App:S:90D, and as a basis for this proceeding alleges as follows:

I.

The Petitioner is an individual residing at Suntrana, Alaska. The income tax return which is involved in this proceeding is that of Petitioner for the calendar year 1947. The 1947 return was filed with the Collector of Internal Revenue, Tacoma, Washington.

II.

On December 19, 1952, Respondent mailed Petitioner, at his residence, Suntrana, Alaska, a notice determining a deficiency in income taxes for the calendar year 1947 in the amount of \$1,476.69, a penalty under Section 294(d)(1) of the Internal Revenue Code of \$132.91, and a penalty under Section 294(d)(2) of the Internal Revenue Code of

\$88.60, all of which amounts are in dispute herein. A copy of said notice of deficiency, together with a statement covering same, is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

III.

In determining such deficiency and penalties, Respondent erred in the following respect:

(a) In disallowing a depletion deduction of \$5,596.54.

IV.

The facts upon which Petitioner relies in support of the foregoing assignment of error are as follows:

(a) The Petitioner Emil Usibelli operates a coal mine in Alaska. He first began his coal mining operations in Alaska in the year 1943, and has continued to the present time. On April 5, 1946 the Secretary of the Interior under Fairbanks Serial 06089, granted the United States Army special permission to mine coal from the following land in Alaska:

S $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 19, NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 20, T. 125, R. 6 W., F. M., Alaska.

The permit provided that the Army might contract for mining of coal by private parties providing the contractor filed a \$10,000 bond conditioned upon proper mining in accordance with operating regulations satisfactory to the Geological Survey representative. The Army's permit, unless otherwise terminated, was to expire six months after the cessation of hostilities "in the present war", as de-

terminated by proclamation of the President or concurrent resolution of the Congress. Emil Usibelli held contracts for mining coal with the Army, and on June 24, 1946, he filed a satisfactory \$10,000 bond executed by the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety.

The President by Proclamation 2714 of December 31, 1946, proclaimed cessation of hostilities of World War II, effective 12:00 o'clock noon on the same date.

On May 20, 1947, the Army filed a petition for extension of the permit, Fairbanks Serial 06089, and for its amendment to include as additional lands the following described subdivisions:

T. 125, R. 6 W., F. M., Alaska

Sec. 16, SW $\frac{1}{4}$

Sec. 17, S $\frac{1}{2}$

Sec. 18, SE $\frac{1}{4}$

Sec. 19, N $\frac{1}{2}$ NE $\frac{1}{4}$

Sec. 20, N $\frac{1}{2}$ NW $\frac{1}{4}$

On May 21, 1947, Emil Usibelli filed coal lease application, Fairbanks Serial 06561, embracing all of the lands included in the May 20, 1947, permit application of the Army, with the exception of the Southwest Quarter of Section 16. This application was filed with the United States Department of Interior, Bureau of Land Management. The Army advised the Department of Interior, Bureau of Land Management, that it was willing that its permit be cancelled when Mr. Usibelli's application was granted, but it requested that its permit be

meanwhile extended in order that no time elapse between the expiration of its permit and the issuance of Mr. Usibelli's coal lease under application Fairbanks Serial 06561.

On August 15, 1947, the Department of Interior, Bureau of Land Management, granted the request of the Army in its application of May 20, 1947, extending their permit from June 30, 1947 covering the additional lands applied for, until the effective date of a lease which might be issued for the land to Emil Usibelli, subject to the filing by Usibelli of the written consent of the United States Fidelity & Guaranty Company of Baltimore, Maryland, to the amendment and the extension of the permit and its agreement to remain bound under its bond, or under a new and satisfactory \$10,000 bond.

On August 26, 1947, Emil Usibelli filed a request that his application for coal lease be amended to include as additional land the Southwest Quarter of Section 16.

The Department of the Interior granted Emil Usibelli his lease on or about April 1, 1949, the Army permit continuing to that date.

Emil Usibelli had various contracts for the sale of coal to the Army during the time he was conducting his coal mining operations in Alaska. On July 1, 1947, he entered into Contract No. WOO-017-qm-1, a negotiated contract with the Army, providing for the sale to the Army of 45,000 tons of sub-bituminous mine run coal at \$5.22 a ton, 25,000 tons of sub-bituminous lump nut coal at \$6.22 a ton, and 30,000 tons of sub-bituminous steam and stoker

coal at \$6.22 a ton. Emil Usibelli worked under this contract during the years 1947 and 1948. The coal supplied to the Army under this and other contracts during the years 1948 and 1949 was mined on the property included in the Army's permit, Fairbanks Serial 06561, Usibelli's mining rights being granted under a continuing special permit pending the issuance of the April 1, 1949 permanent lease.

Petitioner had a depletable interest in his coal mining operations under the facts outlined above during the years 1947 and 1948.

Wherefore, petitioner prays that this Court hear and determine this proceeding, and find that petitioner properly reported his income tax in his return for the calendar year 1947, and properly paid his tax thereon, and that this Court determine such other and further relief as may be proper in the premises.

/s/ A. R. KEHOE,
Counsel for Petitioner

Duly Verified.

EXHIBIT "A"

1215 Smith Tower Building
Seattle 4, Washington

ADC:APP:S:90D—S:DM

Dec. 19, 1952

Mr. Emil Usibelli, Suntrana, Alaska

Dear Mr. Usibelli:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947, discloses a deficiency of \$1,-476.69 and \$221.51 in penalties as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 150 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for the redetermination of the deficiency. In counting the 150 days you may not exclude any day unless the 150th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted the 150th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 150-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Assistant District Commissioner, Appellate, 1215 Smith Tower, Seattle 4, Washington. The

signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

John S. Graham, Acting Commissioner
of Internal Revenue

/s/ By J. B. Harlacher, Asst. District
Commissioner, Appellate

Enclosures: Statement, Form 1276, Agreement form
D. Mitchell; hvs

Statement

ADC:App:90D—S:DM

Mr. Emil Usibelli, Suntrana, Alaska.

Tax Liability for the taxable year ended December 31, 1947:

| | | | Penalties | |
|------|-------------|------------|-----------------|-----------------|
| Year | Kind of Tax | Deficiency | Sec. 294(d) (1) | Sec. 294(d) (2) |
| 1947 | Income | \$1,476.69 | \$132.91 | \$88.60 |

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated January 11, 1951; to your protest dated May 5, 1951; and to the statements made at the conferences held on August 8, 1952 and September 15, 1952.

Inasmuch as you failed to file a 1947 Declaration of Estimated Tax and make any prepayment of your 1947 income tax liability, it is determined that you are liable for the following penalties as provided by Section 294(d) of the Internal Revenue Code.

Penalty for Failure to File Declaration of Estimated Tax under
Section 294(d)(1) of the Internal Revenue Code

| Amount due and unpaid | Installment due date | Rate | Addition to tax |
|--------------------------|--------------------------|------|--------------------|
| \$369.17 | March 15, 1947..... | 10% | \$36.92 |
| \$369.17 | June 15, 1947 | 10% | 36.92 |
| \$369.17 | September 15, 1947 | 10% | 36.92 |
| \$369.18 | January 15, 1948 | 6% | 22.15 |
| Total..... | | | <u>\$132.91</u> |

Penalty for Substantial Underestimation of Declaration of Esti-
mated Tax under Section 294(d)(2) of the Internal Revenue
Code

Corrected Tax\$1,476.69

80% of Corrected Tax\$1,181.35

Less: Withholding Tax actually withheld.....\$ -0-

Estimated Tax -0- -0-

(a) Tentative Addition to Tax.....\$1,181.35

Corrected Tax\$1,476.69

Less: Withholding Tax actually withheld \$ -0-

Estimated Tax -0- -0-

Difference\$1,476.69

(b) Tentative Addition to Tax (6% of \$1,476.69).....\$ 88.60

Addition to Tax:

Tentative (a) or (b) whichever is lesser.....\$ 88.60

A copy of this letter and statement has been mailed to your
representative, Mr. Vernon L. Maxfield, White Building, Seattle,
Washington, in accordance with the authority contained in the
power of attorney executed by you.

Taxable Year Ended December 31, 1947

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....\$5,096.54

Additional income and unallowable deductions

(a) Depletion disallowed 5,596.54

Net income adjusted\$10,693.08

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that you had no economic interest in the coal in place that was being mined in 1947 for the United States Army under certain contracts. Therefore, percentage depletion claimed in the amount of \$5,596.54 is disallowed.

| | |
|---|-------------|
| Net income | \$10,693.08 |
| Less: Exemptions | 2,000.00 |
| <hr/> | |
| Balance subject to normal tax and surtax..... | \$ 8,693.08 |
| Tentative normal tax and surtax..... | 2,195.65 |
| Less: 5% of tentative tax..... | 109.78 |
| <hr/> | |
| Income tax liability | \$ 2,085.87 |
| Income tax liability disclosed by the return, original account No. 3022717 | 609.13 |
| Deficiency of income tax..... | 1,476.69 |
| <hr/> <hr/> | |

[Endorsed]: T.C.U.S. Filed April 13, 1953.

[Title of Tax Court and Cause No. 47798.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph I of the petition.
2. Admits the allegations contained in paragraph II of the petition.
3. (a) Denies that the Commissioner erred in his determination of the deficiency and penalties as shown by the notice of deficiency from which the

petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in subparagraph (a) of paragraph III of the petition.

4. (a) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in subparagraph (a) of paragraph IV of the petition.

5. Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied and that the Commissioner's determination be approved.

/s/ CHARLES W. DAVIS, JOD
Chief Counsel, Bureau of
Internal Revenue

Of Counsel: Wilford H. Payne, District Counsel;
John H. Pigg, Appellate Counsel; John O. Durkan, Assistant Appellate Counsel; Gordon N. Cromwell, Special Attorney, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed May 11, 1953.

[Title of Tax Court and Causes No. 47797-98.]

MOTION TO CONSOLIDATE

Now come the petitioners by their attorney, A. R. Kehoe, and in accordance with the Stipulation of Facts hereinbefore filed:

Request that the Court consolidate these proceedings for hearing.

/s/ A. R. KEHOE,

Attorney for Petitioners

[Endorsed]: T.C.U.S. Granted Oct. 16, 1953.

[Endorsed]: T.C.U.S. Filed Oct. 16, 1953.

MINUTES OF PROCEEDINGS

The Tax Court of the United States

Date: Oct. 16, 1953. Place: Seattle, Wash. Docket No. 47797-47798.

Proceeding: Emil Usibelli and Rose P. Usibelli-Emil Usibelli.

Assigned to Judge Clarence V. Oppen. Division No. 14.

Counsel: For Petitioner, A. R. Kehoe, Esq., Coleman Building, Seattle 4, Washington; for Respondent, Gordon N. Cromwell, Esq.

Stenographic Reporter: Marsh. Hearing 10:30-10:35 a.m. Sub. Transcript Ordered: Yes. On the merits: Yes.

Filed at hearing: Stipulation as to the facts. Motion to consolidate—served.

Petitioner's brief: December 21, 1953.

Respondent's brief: December 21, 1953.

Reply briefs: January 11, 1954.

Exhibits: See stipulation of facts for other exhibits. P-Radiogram.

/s/ CLIFTON H. JACK,
Deputy Clerk

[Title of Tax Court and Causes No. 47797-98.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to these proceedings, by their respective attorneys, that the following facts are true, and that the same may be so taken and considered by the Court as offered in evidence by said parties; provided, however, that this stipulation shall be without prejudice to the right of any of said parties to introduce other and further evidence not inconsistent with the facts herein stipulated.

1. Subject to the approval of the Court, these proceedings may be consolidated for hearing.

2. At all times material herein petitioners were individuals, husband and wife, residing at Suntrana, Alaska. Their returns for the calendar years involved, 1947 and 1948, were filed with the Collector of Internal Revenue for the District of Washington, and are attached hereto as respondent's Exhibits A and B and made a part hereof by this reference. The coal mining operations involved

in these proceedings were returned on an accrual basis. The individual return of Emil Usibelli for the calendar year 1947 is involved in Docket No. 47798. The joint return of Emil Usibelli and Rose P. Usibelli for the calendar year 1948 is involved in Docket No. 47797.

3. The statutory notice of deficiency (a copy of which is attached to the petition Docket No. 47798 and marked Exhibit "A") was mailed to Emil Usibelli on December 19, 1952. The said notice of deficiency advised Emil Usibelli that for the taxable year 1947 respondent had determined a deficiency in his income taxes of \$1,476.69, a section 294(d)(1), I.R.C., penalty of \$132.91 and a section 294(d)(2) penalty of \$88.60. This entire deficiency and all the penalties so determined for 1947 are in dispute and are involved in Docket No. 47798.

4. The statutory notice of deficiency (a copy of which is attached to the petition Docket No. 47797 and marked Exhibit "A") was mailed to Emil Usibelli and Rose P. Usibelli on December 19, 1952. The said notice of deficiency advised Emil Usibelli and Rose P. Usibelli that for the taxable year 1948 respondent had determined a deficiency in their income taxes of \$5,648.24. Of the total deficiency so determined of \$5,648.24, only that amount is in dispute in Docket No. 47797 which relates to disallowance of a depletion deduction claimed in 1948 of \$8,026.71.

5. In the event the Court finds for the petitioners for the years 1947 and 1948, then the judgment of the Court should be entered subject to a Rule 50

computation. On the other hand, should the Court find for the respondent for the years 1947 and 1948, then the judgment of the Court should be for the deficiencies as determined by the statutory notices of deficiency, and the penalties for 1947 if determined to be applicable.

6. The only issue involved is the question of whether, in determining the net income of petitioners from their coal mining operation in Alaska, they are entitled to a deduction for depletion in the amount of \$5,596.54 in the year 1947, and \$8,026.71 for the year 1948.

7. The petitioner, Emil Usibelli (hereinafter referred to as Usibelli), has engaged in mining coal in Alaska from 1945 to the present time. Usibelli entered into contracts to furnish coal to the United States Army during the period from July 1, 1946 to June 30, 1948. The coal supplied to the Army under these contracts was strip-mined at Suntrana, Alaska, on property included in the Army's permit, Fairbanks Serial No. 06089.

8. On April 5, 1946, the Secretary of the Interior of the United States granted the United States Army under Fairbanks Serial No. 06089, special permission to mine coal from the following lands in Alaska:

The South Half of the Northeast Quarter of Section 19, the Northeast Quarter in the South Half of the Northwest Quarter of Section 20, Township 12 S., Range 6 W. F.M., Alaska.

The permit provided that the Army might contract for the mining of coal by private parties providing

the contractor filed a \$10,000 bond conditioned upon proper mining in accordance with operating regulations and to the satisfaction of the Geological Survey representative. The Army's permit, unless otherwise terminated, was to expire six months after the cessation of hostilities in World War II, as determined by proclamation of the President or concurrent resolution of Congress. On June 24, 1946, Usibelli filed a satisfactory \$10,000 bond executed by the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety.

9. On July 1, 1946, the Army and Usibelli entered into a contract, Supply Contract No. W 7500 qm-24, O.I. No. C-47-2, providing for the furnishing of 40,000 tons of mine run coal at a unit price of \$4.75 a ton, or a total of \$190,000, and 30,000 tons of lump nut coal, at a unit price of \$5.75 a ton, or a total of \$172,500, the aggregate amount of the contract being \$362,500. Attached hereto, and made a part hereof by this reference, marked Exhibit 3-C, is a copy of this contract.

10. On September 3, 1946, Usibelli made an application to the Office of Price Administration in Juneau, Alaska, for an increase in the maximum prices for coal produced by him; and on September 30, 1946, he was granted an increase in mine run coal to \$5.47 per ton. Attached hereto and made a part hereof by this reference, marked Exhibit 4-D, is a copy of the ruling of the Office of Price Administration, Juneau, Alaska, granting this increase in price to Usibelli.

11. On October 22, 1946, under Modification No.

1, contract No. W 7500 qm-24, O.I. C-47-2 was amended to provide for an increase in the contract amount by \$28,800. This increase resulted from the increase in the price of mine run coal from \$4.75 to \$5.47 per ton, pursuant to the authorization of the Office of Price Administration, dated September 30, 1946. Attached hereto and made a part hereof by this reference, marked Exhibit 5-E, is a copy of Modification No. 1.

12. On May 1, 1947, contract No. W 7500 qm-24, O.I. C-47-2, was amended to change Item 2 of Schedule of Supplies from lump nut coal to mine run coal, effective November 1, 1946, and changing the unit price from \$5.75 a ton to \$5.47 a ton, decreasing the contract amount by \$8,400, the new total of the contract being changed from \$391,300 to \$382,900, and extending the delivery date of the balance of the coal to September 30, 1947. Attached hereto and made a part hereof by this reference, marked Exhibit 6-F, is Modification No. 2.

13. On May 8, 1947, the Headquarters, Alaska General Depot, mailed Usibelli an invitation to bid on the furnishing of coal to the Army for the fiscal year 1948 (1 July 1947 to 30 June 1948). Attached hereto and made a part hereof by this reference, marked Exhibit 7-G, is a copy of the invitation to bid.

14. On May 15, 1947, Usibelli submitted a bid to the Director of Supply covering bid prices on 70,000 tons, 100,000 tons, and 125,000 tons. Attached hereto and made a part hereof by this reference, marked Exhibit 8-H, is a copy of Usibelli's bid.

15. On May 19, 1947, the Headquarters, Alaska General Depot, advised petitioner that it was the firm intention of the Army to enter into a contract with petitioner to furnish the Army with 70,000 tons of coal during the period July 1, 1947 to June 30, 1948. Attached hereto and made a part hereof by this reference, marked Exhibit 9-I, is a copy of the letter of Headquarters, Alaska General Depot, dated May 19, 1947.

16. The President of the United States by proclamation 2714, dated December 31, 1946, proclaimed cessation of hostilities of World War II, effective twelve o'clock noon on that same date. Under the terms of the Army permit, Fairbanks Serial No. 06089, as stated in paragraph 8 above, the permit was to expire six months after such Presidential proclamation; so in this instance the expiration date became June 30, 1947. On May 20, 1947, the Army filed a petition for an extension beyond June 30, 1947 of the permit, Fairbanks Serial 06089, and for its amendment to include as additional lands, the following described subdivision:

Township 12 S., Range 6 W. F.M. Alaska

Section 16, Southwest Quarter

Section 17, South one-half

Section 18, Southeast one-quarter

Section 19, North one-half, Northeast one-quarter

Section 20, North one-half, Northwest one-quarter

Attached hereto and made a part hereof by this

reference is Exhibit 10-J, which is a letter dated November 3, 1947, from Headquarters of Alaskan Service Base, signed by W. I. Waugaman, Major, Quartermaster Corps, Assistant Base Quartermaster, which incorporated a copy of Decision "N" dated August 15, 1947, which amended the Army coal permit and extended it to December 31, 1947, which documents cover the above stated facts.

17. On May 21, 1947, Usibelli filed coal lease application, Fairbanks Serial 06561, embracing all of the lands included in the May 20, 1947, permit application of the Army, with the exception of the Southwest Quarter of Section 16. This application was filed with the United States Department of the Interior, Bureau of Land Management. The Army indicated to the Department of Interior, Bureau of Land Management, that it was willing that its permit be cancelled when such cancellation was in the interest of the Government. Attached hereto, marked Exhibit 11-K, and made a part hereof by this reference, is the decision of the United States Department of the Interior, Bureau of Land Management, dated May 3, 1948, covering the above stated facts.

18. On June 15, 1947, Contract No. W 7500-qm-24, O.I. No. C-47-2, was further amended to extend delivery date of the remaining coal to December 31, 1947. Attached hereto and made a part hereof by this reference, marked Exhibit 12-L, is Modification No. 3.

19. On August 15, 1947, the Department of Interior, Bureau of Land Management, granted the

request of the Army in its application of May 20, 1947, extending the Army's permit from June 30, 1947, covering the additional lands applied for, until the effective date of a lease which might be issued for the lands. See Exhibit 11-K.

20. On August 25, 1947, Headquarters, Alaskan Service Base Office of the Purchasing and Contracting Officer, sent an order for 45,000 tons of mine run coal, 25,000 tons of lump nut coal, and 30,000 tons of steam and stoker coal, pending the execution of a definite contract to be executed by September 30, 1947, or any subsequent date mutually agreed upon. Attached hereto and made a part hereof by this reference, marked Exhibit 13-M, is a copy of the order of the Headquarters, Alaskan Service Base Office of the Purchasing and Contracting Officer, dated August 25, 1947.

21. Under date of July 1, 1947, the Army and Usibelli entered into the definitive contract, Contract No. WOO-017-qm-1 providing for the furnishing of 45,000 tons of mine run coal at a unit price of \$5.22 a ton, or a total of \$234,900, 25,000 tons of lump nut coal at a unit price of \$6.22 a ton, or a total of \$155,500, and 30,000 tons of steam and stoker coal at a unit price of \$6.22 a ton, or a total of \$186,600, the aggregate amount of the contract being \$577,000. Attached hereto and made a part hereof by this reference marked Exhibit 14-N, is a copy of Contract No. WOO-017-qm-1.

22. About August 26, 1947, Usibelli filed a request that his application for coal lease be amended

to include as additional land the Southwest Quarter of Section 16. See Exhibit 11-K.

23. On November 3, 1947, Usibelli was requested to file written consent of the surety, United States Fidelity & Guaranty Company of Baltimore, Maryland, to the amendment and extension of the Army permit, and its agreement to remain bound under its bond, or a new and satisfactory \$10,000 bond. See Exhibit 10-J. On December 1, 1947, such consent and agreement was filed with Department of the Interior. See Exhibit 11-K.

24. On May 3, 1948, the Department of Interior requested that Usibelli submit his written consent to certain conditions before acting on his lease application Fairbanks 06561. See Exhibit 11-K.

25. On July 2, 1948, Contract No. WOO-017-qm-1, was amended to extend the time of performance of the contract to July 31, 1948. Attached hereto and made a part hereof by this reference, marked Exhibit 15-O, is a copy of a letter of July 2, 1948, from Headquarters, United States Army, Alaska, signed by C. W. Oatley, Assistant Adjutant General, covering the extension of time of performance.

26. The Department of the Interior granted Usibelli, his lease on or about April 1, 1949, the Army permit continuing to that date.

/s/ A. R. KEHOE,

Counsel for Petitioners

/s/ KENNETH W. GEMMILL,

Acting Chief Counsel, Internal Revenue Service,

Counsel for Respondent

EXHIBIT No. 10-J

(Copy)

Headquarters Alaskan Service Base
APO 942, c/o Postmaster, Seattle, Washington

Mr. Emil Usibelli 3 November 1947
Usibelli Coal Company, Healy Forks, Alaska.

Dear Mr. Usibelli:

Transmitted herewith is a copy of Decision "N", dated August 15, 1947, which amends the Army Coal Permit and extends it to December 31, 1947, or until the effective date of a lease which may be issued.

I call your particular attention to Page 2 of the Decision which states that the amendment and extension is: "subject to the filing by Usibelli of the written consent of the surety company to the amendment and extension of the permit, and its agreement to remain bound under its bond, or a new and satisfactory \$10,000 bond."

The consent, or new bond, should be filed in the District Land Office, Bureau of Land Management, Fairbanks, Alaska, as soon as possible so that the decision can become final.

It is requested that this office be notified of the action you have taken on the above.

Very truly yours,

/s/ W. I. Waugaman, Major, QMC
Asst. Base Quartermaster

WIW:ls

In Reply Refer to: Fairbanks 06089 "N" United States Army. (Copy)

United States Department of the Interior, Bureau of Land Management, Washington 25, D. C.

Decision

United States Army: Coal August 15, 1947

Permit Amended and Extended

Under Fairbanks serial 06089, the Secretary of the Interior on April 5, 1946, granted the United States Army special permission to mine coal from the S $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 19, NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 20, T. 12 S., R. 6 W., F.M., Alaska, and held that if the Army contracts for mining of coal by private parties, such contractor must file a \$10,000 bond conditioned upon proper mining in accordance with operating regulations and to the satisfaction of the Geological Survey representative. The Secretary also held that the permit, unless otherwise terminated, would expire six months after the cessation of hostilities "in the present war" as determined by proclamation of the President, or concurrent resolution of the Congress.

On June 24, 1946, the operator, Emil Usibelli, filed a satisfactory \$10,000 bond executed by the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety.

The President by Proclamation 2714 of December 31, 1946, proclaimed cessation of hostilities of World War No. 2, effective 12 o'clock noon on the same date.

On May 20, 1947, the United States Army, through the Adjutant General's Alaskan Headquarters Department, filed a petition for extension of the permit and for its amendment to include as additional lands the following described subdivisions:

T. 12 S., R. 6 W., F.M. Alaska: Sec. 16, SW $\frac{1}{4}$; Sec. 17, S $\frac{1}{2}$; Sec. 18, SE $\frac{1}{4}$; Sec. 19, N $\frac{1}{2}$ NE $\frac{1}{4}$; Sec. 20, N $\frac{1}{2}$ NW $\frac{1}{4}$.

The records show that the additional lands are necessary for continued operation and extension of the strip mine on the lands covered by the special permit, and that all of the lands comprise a logical leasing unit. Coal lease application, Fairbanks 06561, embracing all of the lands, with exception of the SW $\frac{1}{4}$ Sec. 16, was filed May 21, 1947. The lease application is under consideration. The Army has indicated its willingness for the permit to be canceled when such cancellation is in the interest of the Government. It appears that the parties in interest desire the permit extended as specified herein, in order that no time may elapse between the expiration of the permit and the issuance of a coal lease under application, Fairbanks 06561.

In view of the foregoing and of the fact that there appears to be no objection, the permit is amended to include the additional lands applied for, and extended from June 30, 1947, the end of six months from date of the proclamation of the President, to December 31, 1947, or until the effective date of a lease which may be issued for the lands, subject to the filing by Usibelli of the written consent of the above named surety company

to the amendment and extension of the permit, and its agreement to remain bound under its bond, or a new and satisfactory \$10,000 bond.

/s/ Fred W. Johnson, Director

I concur: Aug. 4, 1947.

/s/ Julian D. Sears, Acting Director,
Geological Survey

Approved: Aug. 15, 1947.

/s/ Oscar L. Chapman,
Under Secretary of the Interior

cc: DLO. (2) 7-18-rr G. S. T. V. Dillon.

EXHIBIT No. 11-K

In Reply refer to: Fairbanks 06561-06089 "D. A"
United States Department of the Interior, Bureau
of Land Management, Washington 25, D. C.

Decision

Emil Usibelli: Coal.

May 3, 1948

Consent Required

On May 21, 1947, the above named party filed coal lease application Fairbanks 06561 embracing the following described land:

T. 12 S., R. 6 W., F.M., Alaska, Sec. 17, S $\frac{1}{2}$;
Sec. 18, SE $\frac{1}{4}$; Sec. 19, NE $\frac{1}{4}$; Sec. 20, N $\frac{1}{2}$.

On August 26, 1947, the Acting Manager of the District Land Office transmitted a copy of a letter from the applicant requesting that his application

be amended to include as additional land the SW $\frac{1}{4}$ Sec. 18, township and range mentioned.

All of the lands listed are embraced in special permit Fairbanks 06089 granted by the Secretary of the Interior to the United States Army for the purpose of mining coal. The permit was on August 15, 1947, extended by the Secretary until the effective date of a lease which may be issued for the lands subject to the filing by the operator, namely Emil Usibelli, of the written consent of the United States Fidelity and Guaranty Company, surety on the \$10,000 permit bond, to such extension and the surety's agreement to remain bound under the bond, or a new and satisfactory \$10,000 bond. Such consent and agreement was filed in this office on December 1, 1947.

The records shows that continued operation of the mine on the lands is essential to meet fuel needs of the Army in the locality involved. Accordingly, all of the above described lands (1120 acres) may be segregated as coal leasing block No. 29, Nenana Coal Field, Alaska, and offered for lease at public auction at a minimum bonus of \$1 an acre subject to a royalty of 10 cents a ton, mine run, a minimum investment of \$100 an acre and a \$10,000 bond.

If and when the lands are offered for lease, the notice for publication of the offer will provide that if one other than Usibelli is the highest bidder at the auction he will be required to pay Usibelli the reasonable present value of all permanent mining improvements built for the development of the property (not including stripping and air field con-

struction) which have not been amortized in connection with Usibelli's contract with the Army. If Usibelli is the successful bidder, the investment requirement will be recognized as having been made.

Before action can be taken with respect to offering the lands for lease, it will be necessary for Usibelli to comply with the following requirements:

1. Submit his written consent to the above mentioned terms.

2. Show which of the improvements itemized in the list dated January 19, 1948, prepared by Vernon L. Maxfield & Company, are permanent improvements essential to mining of coal on the lands, their present reasonable value and the extent to which the cost of their construction has been amortized in connection with the fulfillment of his contract with the Army for the production of coal from these lands.

In connection with the operation of the lands under the special permit, the records show that the mine tipple and certain appurtenant mining structures, including garage, bunk house, shop and residence, have been placed in the SW $\frac{1}{4}$ Sec. 24, T. 12 S., R. 7 W., F.M., which land is embraced in coal lease Fairbanks 01068 of the Healy River Coal Corporation, and necessitates the surface use of about 10 acres described as the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 24. Since the surface right to the 10 acres is necessary to the full enjoyment of a lease of the lands under application 06561, the right to use the surface of the 10 acres described will be

made available upon proper application if and when a lease is issued under that application.

Usibelli is allowed 60 days from service of notice hereof to comply with the above requirements, failing in which his lease application will be finally rejected. He has the right of appeal.

/s/ Marion Clawson, Director

cc: D.L.O. 2 G.S. 2 R.A. Reg I Northcutt Ely

[Endorsed]: T.C.U.S. Filed Oct. 16, 1953.

RESPONDENT'S EXHIBIT P

Radiogram

ZEW 92, ZEA127, KF 85, WA282 (Copy)

Received Fairbanks Land Office: Date April 5, 1946.
Hour 3:30 p.m.

KZEW V WDC NR C76 INT.

From Johnson Comm Dept of Int Washington DC
051849Z

To The Register US Dist Land Office Fairbanks
Alaska 00357 GRNC

Re your memorandum March 21 application for permit 06089 filed by Capt Byron L Waldruff for United States Army No authority of law to grant Peru 320 acres under Stction 10 Act October 20 1914 Under general authority the Army may mine coal on the S $\frac{1}{2}$ NE $\frac{1}{4}$ Sec 19 NE $\frac{1}{4}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec 20 T12S R6W FM provided mining is done under supervision of Mining Engineer Geological Survey

and if Army contracts for mining of coal by private parties such contractor must file a \$10000 bond conditioned upon proper mining in accordance with operating regulations and to the satisfaction of Geological Survey representative and that coal so mined will be used exclusively for the needs of the Army this permit unless otherwise terminated will expire six months after the cessation of hostilities in the present war as determined by proclamation of the President or concurrent resolution of the Congress approved Apr 5 1946 PD
1856Z

Admitted in Evidence October 16, 1953.

[Title of Tax Court and Causes 47797-98.]

TRANSCRIPT OF HEARING

Courtroom 815, Federal Court House, Seattle, Washington, Friday, October 16, 1953.

The above-entitled matter came on for hearing, pursuant to notice to the parties at 10:00 o'clock a.m.

Before Clarence V. Oppen, J., Presiding.

Appearances: A. R. Kehoe, Esq., 610 Coleman Building, Seattle, Washington, for petitioners; Gordon N. Cromwell, Esq., Attorney, Bureau of Internal Revenue, for respondent.

The Court: Are you ready to proceed, Gentlemen?

The Clerk: Docket Number 47797, Emil Usibelli

and Rose P. Usibelli. Docket Number 47798, Emil Usibelli.

State your appearances, please.

Mr. Kehoe: A. R. Kehoe for petitioners.

Mr. Cromwell: Gordon N. Cromwell for respondent.

Mr. Kehoe: We have stipulated all the facts. Most of the exhibits are joint exhibits. The government is introducing one additional exhibit, which is "P", which is subject to confirmation and I have agreed it will be withdrawn if it cannot be confirmed in Washington, D. C.

The Court: I want to know at a certain date if I have not heard the exhibit is withdrawn it will be of record.

Mr. Cromwell: I wired the Department of the Interior. I don't know how fast they will work. I ought to have it within the next week.

The Court: The difficulty would be the matter of how you can adequately prepare a brief until you know what the record is. I would say whatever time it would take, ordinarily, to get the transcript would be a reasonable time and it should not be longer than that.

Mr. Kehoe: I would have no specific objection but would have to have more than two weeks.

The Court: Within twenty days. Very well, if, within twenty days they have not stipulated to withdraw it——

Mr. Cromwell: It purports to be a permit issued by the Department of Interior to the United States Army to mine coal in Fairbanks. It is Exhibit "P".

The Court: I am talking of Exhibit "P". If I don't receive word within twenty days that it is agreed by the parties to be withdrawn it will be part of the record.

Mr. Kehoe: That is going at it backward.

The Court: It is going to be official.

Mr. Kehoe: I am agreeable to that procedure.

The Court: You better offer it and I suppose you filed the stipulation of facts.

Mr. Cromwell: I have the stipulation.

The Court: The stipulation is received.

Mr. Cromwell: I offer Respondent's Exhibit "P".

The Court: Subject to agreement just made it will be received and offered in evidence. What about briefs?

[See pages 39-40.]

Mr. Kehoe: I would prefer consecutive briefs rather than simultaneous briefs.

Mr. Cromwell: I would prefer simultaneous briefs.

Mr. Kehoe: I think it is a little more orderly under consecutive briefs but I will go along with the government's position. I would like forty-five days on the opening brief.

The Court: Forty-five days from now?

Mr. Cromwell: I believe we should take into consideration this document.

The Court: In other words, let us say sixty-five days.

Mr. Kehoe: That is satisfactory.

Mr. Cromwell: That is satisfactory.

The Court: And twenty days thereafter for each side to reply.

(Whereupon, at 10:10 o'clock, a.m., the hearing in the above entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed Dec. 7, 1953.

[Title of Tax Court and Causes No. 47797-98.]

MEMORANDUM OPINION

Filed June 30, 1954.

A. R. Kehoe, Esq., for the petitioners.

Gordon N. Cromwell, Esq., for the respondent.

Murdock, Judge: The Commissioner determined deficiencies in income tax for 1947 and 1948 of \$1,476.69 and \$5,648.24. He also determined additions for 1947 of \$132.91 and \$88.60 under section 294(d)(1) and (2) for failure to file a Declaration of Estimated Tax and for substantial underestimation of Declaration of Estimated Tax. The only issue for decision is whether Emil is entitled to a deduction for percentage depletion in connection with his Alaskan coal mining operations. The facts have been presented by a stipulation, including exhibits, and by Exhibit P, all of which are adopted as findings of fact.

The petitioners are husband and wife. They filed a joint return for 1948 and Emil filed a separate return for 1947 with the collector of internal revenue for the District of Washington.

Emil was engaged in coal mining operations in Alaska during the taxable years. The Secretary of

the Interior of the United States granted special permission to the United States Army on April 5, 1946 to mine coal from specified Government land in Alaska. The permit provided that the Army might contract for the mining of coal for its own use by private parties. The mining here in question was done under the permit and extensions thereof.

The Army entered into a contract with Emil, who had filed a satisfactory bond. The contract was dated July 1, 1946 and was to expire on June 30, 1947. It provided that Emil was to furnish and deliver coal for Ladd Field, Alaska, from the mine at Suntrana, Alaska. The coal was to consist of 40,000 tons of mine run and 30,000 tons of lump nut. Emil was to place the coal on railroad cars at the mine, screened and graded. A minimum of 5,600 tons was to be delivered each month. The total amount to be paid Emil was \$362,500, computed at \$4.75 per ton of mine run and \$5.75 per ton of lump nut. The contract provided that it could be terminated by the Government in whole, or from time to time in part, whenever the contracting officer should determine that such action would be for the best interests of the Government and it provided how settlement would be made in case of termination. The Government could terminate the contract or reduce the specified quantities to be delivered if its requirements should change. The provisions of Article 19 entitled "Price Adjustments" were as follows:

In the event that during the contract period

changes should occur in working hours, wage scales, operating expense, or other conditions of employment which changes are a part of the general revision of such conditions within the producing district where the coal is mined, the parties hereto, upon the request in writing of one to the other within thirty (30) days after the effective date upon which any such change occurs, may redetermine by negotiation the unit price affected, provided that pending such negotiations the contractor shall continue deliveries hereunder. Any price redetermined as herein provided shall be applicable to all deliveries after the effective date upon which the change occurs permitting redetermination as herein provided.

Emil applied for and was granted an increase to \$5.47 per ton for mine run in September 1946 and the contract amount was correspondingly increased. The contract was changed in May 1947 to provide that all coal delivered should be mine run and to extend the delivery date to September 30, 1947, later extended to December 31, 1947 due to curtailing of deliveries by the Army.

Emil was invited to bid on the furnishing of coal to the Army for the fiscal year 1948, he submitted a bid on May 15, 1947, and was advised on May 19, 1947 that the Army intended to contract with him to furnish 70,000 tons during the period July 1, 1947 to June 30, 1948 as soon as funds were available.

The President of the United States proclaimed cessation of hostilities on December 31, 1946 and

the Army permit to mine the coal would have expired as a result on June 30, 1947 but it was extended to December 31, 1947 and later to the effective date of a lease which might be issued for the lands. Emil had applied for a lease of the lands on May 21, 1947. A lease was granted to Emil in 1949.

The Government, on August 25, 1947, ordered 45,000 tons of mine run, 25,000 tons of lump nut and 30,000 tons of steam and stoker coal to be delivered by Emil, pending the execution of a definite contract. The Army and Emil entered into a new contract dated July 1, 1947 covering the coal ordered on August 25, 1947 to be delivered between July 1, 1947 and June 30, 1948. The amount to be paid Emil was \$577,000, computed at \$5.22 per ton of mine run and \$6.22 per ton for the other grades. The other provisions of the contract were substantially the same as those in the earlier contract. The performance time was later extended to July 31, 1948.

Emil conducted mining operations under the contracts and the order during the taxable years. The Commissioner disallowed claimed depletion deductions of \$5,596.54 for 1947 and \$8,026.71 for 1948 with the explanation that Emil had no economic interest in the coal in place that he was mining for the United States Army.

The coal belonged at all times to the United States Government. Emil was merely employed on an annual basis to mine and load the coal for use by the Army. The coal was never sold. Emil was paid an agreed amount for the work which he per-

formed. The record does not show that his payments depended upon any sales or market prices of the coal but indicates that they depended upon mining costs. The fact that Emil was applying for a lease is immaterial since he was not a lessee during the taxable years. He could mine only limited quantities of coal and the amount could be reduced by the Government. The contracts could be terminated by the Government under certain circumstances.

A study of the entire arrangement between Emil and the Army fails to disclose any economic interest held by Emil in the coal in place as would be necessary to entitle him to deductions for percentage depletion. *Helvering vs. Bankline Oil Co.*, 303 U.S. 362; *Morrisdale Coal Mining Co.*, 19 T.C. 208; *The Mammoth Coal Co.*, 22 T.C. . . (June 16, 1954). Cf. *James Ruston*, 19 T.C. 284; *J. E. Vincent*, 19 T.C. 501, reversed in part sub nom *Commissioner vs. Gregory Run Coal Company, et al.*, . . F.2d . . , (April 9, 1954); *Helen C. Brown*, 22 T.C. . . (April 13, 1954).

Decision will be entered for the respondent.

The Tax Court of the United States
Washington

Docket No. 47797

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, filed June 30, 1954, it is

Ordered and Decided: That there is a deficiency in income tax of \$5,648.24 for the year 1948.

[Seal] /s/ J. E. MURDOCK,
Judge

Entered: July 6, 1954. Served July 6, 1954.

The Tax Court of the United States
Washington

Docket No. 47798

EMIL USIBELLI,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, filed June 30, 1954, it is

Ordered and Decided: That there is a deficiency in income tax of \$1,476.69 for the year 1947, and additions to tax of \$132.91 and \$88.60 for failure to file, and for substantial underestimation of Declaration of Estimated Tax, for the year 1947.

[Seal] /s/ J. E. MURDOCK,
 Judge

Entered: July 6, 1954. Served July 6, 1954.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Court Causes No. 47797-47798.]

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The petitioners in the above proceedings hereby petition the United States Court of Appeals for the

Ninth Circuit to review the decision entered by the Tax Court of the United States in these proceedings on July 6, 1954: that for the calendar year 1947, for Emil Usibelli in Docket No. 47798, "there is a deficiency in income tax of \$1476.69 and additions to tax of \$132.91 and \$88.60 for failure to file, and for substantial understatement of declaration of estimated tax,"; and for Emil Usibelli and Rose P. Usibelli for the calendar year 1948, "that there is a deficiency in income tax of \$5648.24". This Petition for Review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code in effect prior to the passage of the Internal Revenue Code of 1954, and Sections 7482 and 7483 of the Internal Revenue Code of 1954.

At all times material herein, petitioners were individuals, husband and wife, residing at Suntrana, Alaska. The returns for years involved were filed with the Collector of Internal Revenue for the District of Washington, in Tacoma, Washington which is in the jurisdiction of the United States Court of Appeals for the Ninth Circuit. The coal mining operations involved in these proceedings were returned on an accrual basis. The individual return of Emil Usibelli for the calendar year 1947 is involved in Docket No. 47798. The joint return of Emil Usibelli and Rose P. Usibelli for the calendar year 1948, is involved in Docket No. 47797. The parties to these proceedings have stipulated in the Tax Court hearing that the matters might be consolidated for trial.

Nature of Controversy

The sole question involved is the question of whether, in determining the net income of petitioners from Emil Usibelli's coal mining operation in Alaska, they are entitled to a deduction for depletion in the amount of \$5596.54 for the year 1947 and \$8026.71 for the year 1948. If such deduction for depletion is available, there is no basis for the application of the penalty determined by the Tax Court in Docket No. 47798 for failure to file, and for substantial underestimation of Declaration of Estimated Tax, for the year 1947. The question of whether or not the petitioners have the right to a depletion deduction for these years hinges on the question of whether or not they had an economic interest in certain coal lands in Alaska from which coal was mined and sold to the United States Army. The coal was mined on land under the jurisdiction of the Bureau of Land Management of the Department of the Interior of the United States. Petitioners had filed an application for a mining lease under the "Coal Leasing Act" of Congress providing for the leasing of coal lands in the Territory of Alaska (38 Stat. 741), and their application was pending during the years involved herein. Meanwhile, the United States Army had a special permit from the Department of the Interior giving them access to the coal lands and under the permit the Army could arrange for a private operator to strip-mine the coal and sell it to the Army providing a proper bond was posted. The Army entered into a contract with petitioners under date of July

1, 1946, providing that petitioners were to furnish and deliver coal for Ladd Field Alaska from the mine at Suntrana, Alaska. The coal was to consist of 40,000 tons of mine run and 30,000 tons of lump nut. The total amount to be paid petitioners for the coal was \$362,500. computed at \$4.75 per ton of mine run coal and \$5.75 per ton of lump nut coal. The Army and petitioners entered into a second contract dated July 1, 1947, covering 45,000 tons of mine run coal, 25,000 tons of lump nut coal, and 30,000 tons of steam and stoker coal. The amount to be paid petitioners under this contract was \$577,000. computed at \$5.22 per ton for mine run coal and \$6.22 per ton for the other grades. Under these contracts, the first of which was to run from July 1, 1946 to June 30, 1947 and the second of which was to run from July 1, 1947 to June 30, 1948, petitioners were specifically granted the right to mine the coal on the lands embraced in the Army permit. In addition, the Army arranged for its permit to continue until petitioner's lease was available from the Department of the Interior. Petitioners filed the necessary bond as required by the permit.

While operating under the first Army contract, on September 3, 1946, petitioners made an application to the Office of Price Administration in Juneau, Alaska, for an increase in the maximum prices for coal produced and on September 30, 1946, petitioners were granted an increase in mine run coal to \$5.47 per ton. This increase was reflected in a modification of the first army contract

under date of October 22, 1946 providing for an increase in the contract price of the coal by \$28,800, this amount covering the increase in the price of mine run coal from \$4.75 to \$5.47 per ton.

The Tax Court held in a memorandum opinion by Judge Murdock filed June 30, 1954, that petitioners were merely employed on an annual basis to mine and load the coal for use by the Army, and that the coal was never sold. Judge Murdock stated in his memorandum opinion, "a study of the entire arrangement between Emil Usibelli and the Army fails to disclose any economic interest held by Emil in the coal in place as would be necessary to entitle him to deductions for percentage depletion". It is submitted that petitioners had an economic interest in the coal lands under the Army contracts and under their permits granted by the Army with approval of the Bureau of Land Management of the Department of Interior, and they were entitled to the depletion deduction for the years 1947 and 1948.

Wherefore, petitioners petition that the original record in the United States Tax Court Docket Nos. 47797 and 47798 be certified and transmitted to the Court of the United States Court of Appeals for the Ninth Circuit for filing and appropriate action, to the end that the errors complained of may be reviewed and corrected by the said United States Court of Appeals for the Ninth Circuit.

/s/ A. R. KEHOE

Duly Verified.

[Endorsed]: T.C.U.S. Filed September 22, 1954.

[Title of Tax Court and Causes No. 47797-98.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Daniel A. Taylor, Chief Counsel, Internal Revenue Service, Internal Revenue Building, Washington, D. C.

You are hereby notified that the above petitioners have filed with the Clerk of the United States Tax Court, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 20th day of September, 1954.

/s/ A. R. KEHOE,
Counsel for Petitioners

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed September 23, 1954.

[Title of Tax Court and Causes No. 47797-98.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To: The Clerk of the Above Entitled Court:

Petitioner, by and through A. R. Kehoe, his attorney, hereby designates the entire record in this case to be contained in the record on appeal, the

appeal to be heard on the original papers under Rule 11 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit.

/s/ A. R. KEHOE,

Attorney for Petitioner

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed September 23, 1954.

[Title of Tax Court and Causes No. 47797-98.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents 1 to 30, inclusive, constitute and are all of the original papers and proceedings, including Respondent's exhibits (A and B) and Joint exhibits (3-C through 15-O), attached to the Stipulation of Facts and Respondent's exhibit (P) admitted in evidence, on file in my office as called for by the "Designation as to Contents of Record on Review" in the proceedings before The Tax Court of the United States entitled: "Emil Usibelli and Rose P. Usibelli, Petitioners, vs. Commissioner of Internal Revenue, Respondent, Docket No. 47797," and "Emil Usibelli, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 47798," and in which the petitioners in The Tax Court proceedings have initiated appeals as above numbered and entitled, together with a true copy of the docket

entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 12th day of October, 1954.

[Seal] /s/ VICTOR S. MERSCH,
Clerk,
The Tax Court of the United
States

[Endorsed]: No. 14559. United States Court of Appeals for the Ninth Circuit. Emil Usibelli and Rose P. Usibelli, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: October 22, 1954.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14559

EMIL USIBELLI and ROSE P. USIBELLI,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

EMIL USIBELLI, Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STATEMENT OF POINTS ON APPEAL

Appellant hereby designates the following Statement of Points on which he intends to rely in his appeal from the decision of the United States Tax Court made and entered July 6, 1954, in Tax Court Docket Nos. 47797 and 47798.

I.

The Tax Court erred in finding that under Appellant's permit and contracts with the Army during the years 1947 and 1948, he was merely employed on an annual basis to mine and load coal for use by the Army and that the coal was never sold and the entire arrangement between Appellant and the Army fails to disclose any economic interest held by Appellant in the coal in place as would be necessary to entitle him to deductions for percentage depletion.

II.

The Tax Court erred in failing to find that Appellant had an economic interest in the coal in place in 1947 and 1948 that would entitle him to a deduction for depletion in the amount of \$5596.54 for 1947 and \$8026.71 for 1948.

III.

The Tax Court erred in determining a deficiency in income tax of \$1476.69 and additions to tax of \$132.91 and \$88.60 for failure to file and substantial understatement of estimated tax for Emil Usibelli for the calendar year 1946 and a deficiency in income tax of \$5648.24 for Emil Usibelli and Rose P. Usibelli on a joint return for the calendar year 1948.

/s/ A. R. KEHOE,

Counsel for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed November 15, 1954. Paul P. O'Brien, clerk.

[Title of U. S. Court of Appeals and Causes.]

APPELLANT'S DESIGNATION OF RECORD

To the Clerk of the Above Entitled Court:

Appellant designates the following portions of the record to be printed:

Tax Court Dockets Nos. 47797 and 47798.

1. Docket Entries No. 47797.

2. Docket Entries No. 47798.
 3. Petition No. 47797.
 4. Answer No. 47797.
 5. Petition No. 47798.
 6. Answer No. 47798.
 7. Motion to consolidate—Granted.
 8. Minutes of Proceedings before the Tax Court of the United States.
 9. Stipulation of Facts but Exhibits not to be printed.
 10. Respondent's Exhibit P admitted in evidence but Exhibit P not to be printed.
 11. Official Report of Proceedings before the Tax Court of the United States.
 12. Memorandum Opinion.
 13. Decision No. 47797.
 14. Decision No. 47798.
 15. Petition for Review.
 16. Proof of Service.
 17. Designation of Contents of Record on Appeal and Proof of Service.
- United States Court of Appeals for the Ninth Circuit No. 14559:
18. Appellant's Designation of the Contents of the Record to be Printed.

19. Application by appellant to be Relieved from Printing or Reproducing the Exhibits.

20. Order Dispensing with Printing or Reproducing of Exhibits.

21. Statement of Points on Appeal.

/s/ A. R. KEHOE,
Counsel for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed November 15, 1954. Paul P. O'Brien, clerk.

[Title of U. S. Court of Appeals and Cause.]

APPLICATION BY APPELLANT TO BE RELIEVED FROM PRINTING OR REPRODUCING THE EXHIBITS

Comes Now the Appellant, and respectfully applies to and moves the above entitled Court for an Order relieving the Appellant from printing or reproducing the Exhibits in this case, except for Exhibits 10-J, 11-K, and P, in the printed Transcript of Record on Appeal, and ordering that all said exhibits except for Exhibits 10-J, 11-K and P, be considered by this Court in their original form indetermining the questions involved in this appeal, without such exhibits being so printed or reproduced, and as though they were fully set forth in said printed Transcript of Record. This application is based upon the grounds that said Exhibits are voluminous, that some of them are not of a printable type, that some

of the others are not easily printable, that the inclusion of all of the exhibits, except for Exhibits 10-J, 11-K and P, in the printed Transcript of Record would make it extraordinarily long, and that the cost would be greatly disproportionate to the convenience of having them all so included as in all probability there will be very little need to refer to many of them. This application is supported by the Stipulation by the parties hereto filed herewith.

/s/ A. R. KEHOE,
Counsel for Appellant

and

It Is Hereby Stipulated and Agreed by and between Appellant and Appellee herein, appearing and acting by and through their said respective attorneys, that all of the exhibits other than Exhibits 10-J, 11-K and P, introduced in evidence at the trial of the above entitled case, may be considered in their original form by the above entitled court in determining the questions involved in this Appeal; that for the reasons stated in said application, the said parties do not consider it necessary or practical to print or otherwise reproduce said exhibits in the printed Transcript of Record on Appeal, and the parties herein respectfully request the above entitled Court to consider each and all of the said exhibits in their original form as though the said exhibits had been printed or otherwise reproduced in the printed Transcript of Record, and further request the above entitled Court to make and enter an Order granting Appellant's said ap-

plication. The parties are agreed that Exhibits 10-J, 11-K and P be included in the printed Transcript of Record on Appeal.

Dated, November 12th, 1954.

/s/ A. R. KEHOE,

Counsel for Appellant

/s/ H. BRIAN HOLLAND,

Assistant Attorney General,

Counsel for Appellee

[Endorsed]: Filed November 23, 1954. Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF OF PETITIONERS

JONES & GREY

A. R. KEHOE

Counsel for Petitioners

610 Colman Building,
Seattle 4, Washington.

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PAUL P. O'BRIEN,
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United States Court of Appeals
For the Ninth Circuit

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF OF PETITIONERS

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A. R. KEHOE

Counsel for Petitioners

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Seattle 4, Washington.

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United States Court of Appeals

For the Ninth Circuit

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,

vs.

COMMISSONER OF INTERNAL REVENUE,
Respondent.

} No. 14559

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF OF PETITIONERS

OPINION BELOW

The Findings of Fact and Opinion of the Tax Court (R. 43) are reported at T. C. Memo. 1954-84, filed June 30, 1954.

JURISDICTION

On December 19, 1952, the respondent, Commissioner of Internal Revenue, mailed to petitioner Emil Usibelli a notice of deficiency in income tax for the year ended December 31, 1947, of \$1,476.69 and penalty under §294 (d)(1) of the Internal Revenue Code of \$132.91, and penalty under §294(d)(2) in the amount of \$88.60, and on the same date respondent mailed to petitioners Emil Usibelli and Rose P. Usibelli a notice of deficiency in income tax on a joint return for the year ended December 31, 1948 of \$5,648.24 (R. 18, 8). On April 13, 1953, pursuant to §272 I.R.C., and within the 150-day period

prescribed by that section, petitioners filed with the Tax Court their petitions for redetermination of said deficiencies and penalties (R. 1, 3, 13). A motion to consolidate the two cases for hearing was filed and granted October 16, 1953 (R. 2). The petitions were heard on October 16, 1953, and the Tax Court entered its decision on July 6, 1954 (R. 2, 48,49). Petitioners filed their petition for review on September 22, 1954, and filed proof of service thereof on September 23, 1954 (R. 2). The jurisdiction of the court rests on §§1141 and 1142 of the Internal Revenue Code in effect prior to the passage of the Internal Revenue Code of 1954 and §§7482 and 7483 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

The sole question involved in this case is whether in determining the net income of petitioners from Emil Usibelli's coal mining operation in Alaska they are entitled to a deduction for depletion in the amount of \$5,596.54 for the year 1947 and \$8,026.71 for the year 1948. If such deduction is available, there is no basis for application of the penalty determined by the Tax Court for the year 1947 for failure to file and for substantial underestimation of declaration of estimated tax. Petitioners' right to a depletion deduction for these years hinges on whether or not they had an economic interest in certain coal lands in Alaska from which they mined coal for sale to the United States Army.

STATEMENT OF THE CASE

There is no real factual controversy in this case. It was submitted on a stipulation of facts without either party calling witnesses or introducing other evidence (R. 41). The facts may be briefly stated as follows:

The petitioner Emil Usibelli has been engaged in strip-mining coal in Alaska from 1945 to the present time. Petitioners' coal mining operations were conducted on land under the jurisdiction of the Bureau of Land Management of the Department of the Interior of the United States. Petitioners had filed an application for a mining lease in the Territory of Alaska and their application was pending during the years involved herein. Meanwhile, the United States Army had a special permit from the Department of the Interior giving them access to the coal lands and under the permit the Army could arrange for a private operator to strip-mine the coal and sell it to the Army providing a proper bond was posted (R. 26-27). The Army entered into a contract with petitioners under date of July 1, 1946, providing that petitioners were to furnish and deliver coal for Ladd Field, Alaska, from the mine at Suntrana, Alaska. The coal was to consist of 40,000 tons of mine run and 30,000 tons of lump nut. The total amount to be paid petitioners for the coal was \$362,500 computed at \$4.75 per ton of mine run coal and \$5.75 per ton of lump nut coal (R. 27). The Army and petitioners entered into a second contract dated July 1, 1947, covering 45,000 tons of mine run coal, 25,000 tons of lump nut coal,

and 30,000 tons of steam and stoker coal. The amount to be paid petitioners under this contract was \$577,000 computed at \$5.22 per ton for mine run coal and \$6.22 per ton for the other grades (R. 31). Under these contracts, the first of which was to run from July 1, 1946, to June 30, 1947, and the second of which was to run from July 1, 1947, to June 30, 1948, petitioners were specifically granted the right to mine the coal on the lands embraced in the Army permit (Page 1 of Schedule of Supplies, Ex. 3-C). In addition, the Army arranged for its permit to continue until petitioner's lease was available from the Department of the Interior (Ex. 10-J). Petitioners filed the necessary bond as required by the permit (R. 27).

While operating under the first Army contract, on September 3, 1946, petitioners made an application to the Office of Price Administration in Juneau, Alaska, for an increase in the maximum prices for coal produced, and on September 30, 1946, petitioners were granted an increase in the price of mine run coal to \$5.47 per ton. This increase was reflected in a modification of the first Army contract under date of October 22, 1946, providing for an increase in the contract price of the coal by \$28,800, this amount covering the increase in the price of mine run coal from \$4.75 to \$5.47 per ton (R. 27).

Petitioners' lease was granted April 1, 1949 (R. 32).

The trial judge, in his memorandum decision denying the petitioners' right to depletion, stated:

“The coal belonged at all times to the United

States Government. Emil was merely employed on an annual basis to mine and load the coal for use by the Army. The coal was never sold. Emil was paid an agreed amount for the work which he performed. The record does not show that his payments depended upon any sales or market prices of the coal but indicates that they depended upon mining costs. The fact that Emil was applying for a lease is immaterial since he was not a lessee during the taxable years. He could mine only limited quantities of coal and the amount could be reduced by the government. The contracts could be terminated by the government under certain circumstances.

“A study of the entire arrangement between Emil and the Army fails to disclose any economic interest held by Emil in the coal in place as would be necessary to entitle him to deductions for percentage depletion.”

SPECIFICATION OF ERRORS

Petitioners hereby make the following specification of errors relied upon in this appeal:

I.

The Tax Court erred in finding that under Emil Usibelli's permit and contracts with the Army during the years 1947 and 1948, he was merely employed on an annual basis to mine and load coal for use by the Army; that the coal was never sold; that the entire arrangement between Emil Usibelli and the Army fails to disclose any economic interest held by Usibelli in the coal in place as would be necessary to entitle him to deductions for percentage depletion.

SUMMARY OF ARGUMENT

In his memorandum opinion the Trial Judge actually mentions four different and distinctive reasons for his ultimate determination that petitioners lacked the necessary economic interest in the coal in place that would entitle them to the depletion deduction. These were that the government could limit the amount of coal mined and could terminate the contracts under certain circumstances; that the petitioners were paid an agreed amount for their work and their compensation was not dependent on sales or market prices; that petitioners were mere hirelings or agents and not independent contractors; and that the coal belonged at all times to the government and was never sold. As will hereafter be shown the Judge's reasons and conclusion will not be supported by the law and evidence in this case.

ARGUMENT

The rights of coal stripping contractors to depletion have been generally recognized by the courts. Two limitations have appeared in Rulings or Tax Court decisions but a careful analysis will show that neither is applicable here.

The first limitation is that of cancellation at will reflected in a Ruling of the General Counsel's office issued in 1950 as G.C.M. 26290, C.B. 1950-1, p. 42. That Ruling related to deductions for depletion under §23(m) I.R.C., in the case of stripping contractors in coal mines. The General Counsel's Memorandum states in part:

“For the purpose of facilitating consideration of

the question here involved, a number of the stripping contracts which it is understood are typical of those used in the coal industry have been examined. For convenience, the parties to such contracts will be hereinafter referred to as the coal company and the contractor, respectively. In view of the contents of the contracts examined, it is the opinion of this office that, dependent upon their rights in respect of the properties involved, stripping contractors may be properly regarded as entitled to deduction for depletion in all respects as in the case of other mineral properties. The fact that some of the contracts bear aspects of agency or employment, or that ostensibly the contractor may not acquire legal title to the mineral, does not control. * * *

“It is not the view of this office, however, that the deduction for depletion is to be granted in every case. On the contrary, it seems clear that the allowance is warranted only where, under the agreement between the parties, the stripping contractor obtains a capital interest in the mineral in place and must look to the severance and sale of the mineral for the return of capital consumed in that process. (See G.C.M. 22730, *supra*.) In this respect, it is noted that in some instances contracts may be cancelled by the coal company at will. Under said circumstances, it would appear that the contractor received no binding right to extract the mineral and thus fails to obtain a capital interest therein. Lacking such an interest in the mineral, it follows that the contractor cannot properly claim a deduction for depletion.

“In the opinion of this office, a contract which is terminable by the coal company at will, and which thus fails to vest in the contractor the requisite

capital interest in the mineral in place, is one in which the coal company has an absolute right to cancel at any time without cause or condition. * * *

“One of the contracts examined shows that the coal company reserves the right, without payment of damages, to ‘suspend’ work indefinitely at any time or from time to time; under another contract, the coal company is given the right, upon five days’ notice to the contractor and without payment of damages, to suspend work for an indefinite period; and under a third contract the coal company may suspend operations during such time or times as the company operates at a loss because of the minimum payable to the contractor. Since contracts of this character, despite the power of indefinite suspension provided for therein, do not, except under specific conditions, appear to permit the coal company to dismiss contractors absolutely and substitute others to extract the minerals, it is the opinion of this office that such contracts should not be classified as contracts which may be cancelled ‘at will.’

“It is noted further that in some of the contracts the contractor must look for his compensation solely to the extraction and sale of the coal, that in others his compensation is dependent partly upon extraction and sale of the coal and partly upon removal of the overburden and other factors, and that in still others the remuneration payable to the contractor is in no way dependent upon extraction and sale of the mineral. * * * Where, under the tests hereinbefore described, the contract is not terminable at the will of, or upon nominal notice by, the coal company, it is the view of this office that if the contractor must look for his compensa-

tion solely to the extraction and sale of the mineral, he is entitled to deduction for depletion. * * *

It is quite clear that in the instant case this limitation is not applicable. The rights of the Army in the coal lands were first granted to continue until six months after cessation of hostilities in World War II. They were later extended to continue until Emil Usibelli's lease was available. Under his contracts with the Army, Emil Usibelli had all of the rights in the coal lands that the Army had. It is true that decision "N" dated August 15, 1947 (Ex. 10-J) provides "the Army has indicated its willingness for the permit to be cancelled when such cancellation is in the interest of the government." But decision "N" goes on to provide immediately following, "It appears that the parties in interest desire the permit extended as specified herein, in order that no time may elapse between the expiration of the permit and the issuance of a coal lease under application, Fairbanks 06561." Fairbanks 06561 was, of course, Emil Usibelli's application for a lease of the coal land (R. 30).

An examination of the contracts between Emil Usibelli and the Army quickly indicates that the contracts were not ones in which the Army had an absolute right to cancel at any time without cause or condition. Again it is true that Article 8 of the first contract (Ex. 3-C) and a comparable provision of the second contract provide in part "The performance of work under this contract may be terminated by the government in accordance with this Article in whole, or from time to time in part, whenever the contracting officer shall determine any such termination is for the best interest of the Gov-

ernment.” But Article 8 then goes on to provide that except for a general termination or termination because of war end “such termination shall only be made in accordance with the provisions of this article, unless the contracting officer finds that the contractor is then in gross or willful default under this contract.” Then in paragraph (2) of Article 8 the contract provides what the contractor should do in the event of notice of termination, and paragraph (3) goes on to provide for possible agreement by the contractor and the contracting officer for the measure of compensation resulting from the termination including a reasonable amount for profit, and paragraph (4) provides that in the event of the failure of the contractor and the contracting officer to agree as to the amounts to be paid to the contractor by reason of the total or partial termination of the work, then the government shall pay the contractor a schedule of varying amounts which are set forth in detail. Even the somewhat unilateral termination provisions of Article 18 and its counterpart in the second contract are limited by their own terms to the situation wherein the consuming point is abandoned or consumption thereat is reduced or burning equipment is altered or the government should find itself with an excess of surplus from storage at other installations and should desire to ship this surplus to the consuming point.

None of these rights are equivalent to the right of termination at will on the part of the government. At most they qualify as rights of termination under conditions which are specifically stated and are specifically limited.

The second limitation on the rights of coal stripping contractors to depletion is one that has developed in a number of Tax Court decisions, and it is apparent from the decision of the Trial Judge in the instant case that this limitation is the basis of his opinion herein. A succinct analysis of all of the decisions he cites shows that in them the Tax Court has denied a coal stripping contractor a depletion deduction where he is paid under his contract a set amount per ton mined and where his compensation is in no way a percentage of the ultimate selling price of the coal or measured in any appreciable way by the ultimate selling price of the coal.

The first case cited is that of *Helvering v. Bankline Oil Co.*, 303 U.S. 362, which has been recognized in a number of decisions as authority for the premise that "economic interest" does not embrace a mere economic advantage derived from production through a contractual relation to the owner by one who has no capital investment in the mineral deposit. Judge Murdock has, by lumping it with the other decisions he cites, read into this decision a requirement that a coal stripping contractor must, in order to be entitled to depletion, have some market price risk in his activities.

The next case cited is that of *Morrisdale Coal Mining Co.*, 19 T.C. 208. In effect, in the *Morrisdale Coal Co.* decision, the court found that the independent contractors were mere agents of the operator petitioner, performing the service of strip-mining the coal for a stated amount per ton produced, which amount had no relationship to the market price of the coal and no relationship to the ultimate selling price of the coal. In other

words, the court found that the independent contractors were merely performing services for the operator petitioner, and under these facts, the independent contractors had no economic interest in the coal produced, and for that reason, no depletion deduction was available to them.

The next case cited is that of *James Ruston*, 19 T.C. 284. The *Ruston* case involved contracts wherein the strip-mining contractor was to receive not a stated sum per ton mined, but rather was to receive 83% of the net selling price of the coal produced. The coal was to be sold by the operator, but the strip-mining contractor participated in such sale to the extent of 83% of the net selling price after deduction of a selling commission of 15c per ton. The court in the *Ruston* case referred to decisions where the person performing the mining or drilling operation was merely a "hireling"—a person engaged to perform services at a set amount per ton produced—and held that these cases were not applicable where under the facts involved the strip-mining contractor actually shared in the ultimate selling price of the coal. The court pointed out that in the *Ruston* case the strip-mining contractors were required by the contractor to take risks as to what the ultimate selling price would be, because they had to look to the ultimate selling price of the coal before receiving their compensation for the services rendered. The court held in the *Ruston* case that under the facts involved, the strip-mining contractor held an economic interest in the coal in place, and since its income, the 83% of the net selling price of the coal, was from the severance and

sale of the coal, such income is subject to the percentage depletion allowed by the Internal Revenue Code.

The next case cited is that of *J. E. Vincent*, 19 T.C. 501. In the *Vincent* case, the court thoroughly analyzed and distinguished the *Morrisdale* decision and the *Ruston* decision as follows:

“In *Morrisdale Coal Mining Co.*, 19 T.C. (November 12, 1952), we held that the respondent erred in excluding from a mining lessee’s income from coal properties the amounts that it paid to strippers under several contracts. The contracts there under consideration were generally similar to that between Gregory Run and Summit Fuel in that under them the stripping contractor was engaged to strip-mine coal from designated tracts, and to haul and load it into railroad cars at specified points. For such services, the stripping contractors were to receive a specified amount per net ton of coal-strip mined and loaded into railroad cars. * * *

“Upon examination of the several stripping contracts in the *Morrisdale Coal* case, *supra*, we concluded that none of them granted to the stripping contractors an economic interest in the coal in place, and for that reason no apportionment of the gross income from the property was to be made between the employing contractor and the stripping contractor. In that case, analyzing two of the stripping contracts, we said in part:

“ ‘Most of the cases in which depletion has been allowed to an independent contractor have involved situations where the producer or miner of the mineral or other depletable asset has received payment either in kind or as a percentage of the ultimate selling price or profit derived from the sale of the

commodity. *Spalding v. United States* (C.A. 9, 1938), 97 F.(2d) 697, *certiorari* denied 305 U.S. 644 (1938); cf. *Edward J. Hudson*, 11 T.C. 1042 (1948), *affd.* (C.A. 5, 1950) 183 F.(2d) 180.

“ ‘Neither of such situations is present in the instant case. The independent contractors received a stated amount per ton for coal of good merchantable quality satisfactory to petitioner. The amount they were to receive per ton was not dependent upon the market nor upon the price petitioner received upon the sale of such coal. Payment was made at stated intervals provided in the contract and was entirely independent of whether or when petitioner sold the coal. The contractors assumed no risk as to the market price, they received no payment in coal, and they had no right to sell any coal to other parties.’

“The factors mentioned in the above quotation exist in this case. Summit Fuel was not to receive payment in kind or as a percentage of the selling price or profit; it was to receive a stated price per ton of coal; payment was to be made at stated intervals and was independent of whether or when Gregory Run sold the coal.

“The case of *James Ruston*, 19 T.C. (Nov. 21, 1952), is distinguishable on the facts. In the *Ruston* case, the lessee of coal property contracted with a strip-mining contractor for the mining, loading and shipping of the coal. * * * The contractor was to furnish at its cost and expense all materials, tools, machinery, equipment, and labor, to build all necessary roads, to make all necessary improvements incident to its operations, and to maintain and keep in proper repair and working order the tipple, screens, loading ramps, sidings, etc., on the property, and to screen, produce, load,

clean, and ship the coal at its own expense. * * * The lessee had the right to sell the coal, but it was provided that the interest of the contractor 'in coal produced and shipped shall be 83 per cent of the net selling price' of the coal as received by the lessee, less a selling commission of 15 cents per ton to be deducted from the gross selling price. * * *

"On the facts in the *Ruston* case, outlined above, we concluded that by the contract between the parties the lessee transferred to the stripping contractor an economic interest in the coal in place which entitled the stripper to percentage depletion on its gross income from the severance and sale of coal. The rights, duties and liabilities of Summit Fuel Company were so far different from those in the *Ruston* case as to require a different conclusion as to the relation of the stripper with the lessee of the coal lands. We think the relation of Gregory Run Coal Company and Summit Fuel Company was simply that of employer and employee, which gave the employee no more than an economic advantage derived from production rather than an economic interest in the coal."

The next case cited is that of *Helen C. Brown*, 22 T.C. No. 8. In this case the coal stripping contractor was compensated on the basis of a percentage of gross sales, and the Tax Court, following the decision of the *Ruston* case, held that the contractor was entitled to depletion.

The final case cited is that of *Mammoth Coal Co.*, 22 T.C. No. 73. Here the court found that the stripping contractor was paid a fixed amount per ton which was in no way contingent upon the selling price of the coal and followed the *Morrisdale* and *Vincent* decisions.

In the instant case the Trial Judge found that the coal

stripping contractor was merely employed on an annual basis to mine and load the coal for use by the Army; that the coal was never sold; that the contractor was paid an agreed amount for the work which he performed; and that his payments were in no way dependent upon any sales or market prices of the coal but that they were dependent upon mining costs. He then went on to determine that the contractor did not have the necessary economic interest that would entitle him to deduction for percentage depletion. It is obvious that he put this contractor in the category of the *Morrisdale* and *Vincent* decisions rather than the *Ruston* and *Brown* decisions.

It is submitted that the Trial Judge's decision is both factually and legally in error. Under the evidence in this case it is apparent that Emil Usibelli was not compensated on the basis of a stated amount per ton of coal produced. He actually sold the coal to the Army under *bona fide* contracts at negotiated prices. The prices per ton varied with the type of coal produced. The prices varied from year to year. The contract price for the year 1947 was subject to O.P.A. control and application had to be made to the Office of Price Administration for approval of the modification in selling price that was negotiated and consummated under modification No. 1 dated October 22, 1946. It is likewise clear that Emil Usibelli was not a hireling or agent under his contracts with the Army. If there was no sale involved and if a hireling or agency relationship existed, there would have been no necessity for petitioners going to the O.P.A. for the allowance of an increase in price.

Practically every provision of the contract is inconsistent with the position that no sale was involved or that an agency relationship existed between petitioner and the Army. Article 1 of the contract providing for the furnishing of coal at prices specified in the schedule of supplies for a stated consideration of \$362,500.00 is inconsistent with the position that no sale was involved or that an agency relationship existed. Article 2 providing for payments demonstrates this inconsistency. Article 3 providing for inspection, sampling and acceptance or rejection demonstrates this inconsistency. Article 4 providing a penalty for excess ash content demonstrates this inconsistency. Article 8 providing for termination at the option of the Government demonstrates this inconsistency. This is especially shown by the provision of Article 8, Section (b) providing that in the event of termination the contractor is to "assign to the Government, in the manner and to the extent directed by the contracting officer, all the right, title and interest of the contractor under the orders or subcontracts so terminated." And the same paragraph, providing that in the event of termination contractor shall "transfer title and deliver to the Government in the manner, to the extent and at the times directed by the contracting officer (i) the fabricated or unfabricated parts, work in process, completed work, supplies and other material produced as a part of, or acquired in respect of the performance of, the work terminated in the Notice of Termination." The provisions in the last paragraph of Article 8, Section (d), providing that "Except for normal spoilage and to the extent the Government shall have otherwise

expressly assumed the risk of loss, there shall be excluded from the amounts payable to the contractor as provided in paragraph d(1) and paragraph d(2)(i), all amounts allocable to or payable in respect of the property, which is destroyed, lost, stolen or damaged so as to become undeliverable prior to the transfer of title to the Government or to a buyer pursuant to paragraph (b)(7) or prior to the 60th day after delivery to the Government of an inventory covering such property, whichever shall first occur," demonstrate the inconsistency.

The provisions of Article 9 on anti-discrimination and Article 10 on disputes and Article 11 on convict labor and Article 12 on delays and damages and Article 13, notice to the Government of labor disputes, and Article 14, assignment of rights, and Article 15, taxes, and Article 17, changes in destination, and Article 18, variation from quantities specified, and Article 19, price adjustments, and Article 20, delivery, and the provisions of the schedule of supplies showing f.o.b. shipments subject to inspection and acceptance at destination, and showing the analysis on which award is made providing for moisture content, ash content, B.T.U. minimum, all demonstrate this inconsistency. As a matter of fact the extensive activities reflected in the equipment and expense schedules in petitioners' tax returns (Ex. A and B) demonstrate this inconsistency.

It is submitted that a sale was involved and the coal stripping contractor was more than an agent, and the principles of the *Ruston* and *Brown* decisions justify

depletion allowance here even under the limitation written into the right to depletion by the Tax Court.

However, there is another basis which would justify this court's reversing the Tax Court in the instant case, and this will probably be covered more in detail by a brief *amicus curiae* which undoubtedly will be filed herein if approval is granted. The taxpayer in the *J. E. Vincent* case appealed the decision of the Tax Court to the U. S. Court of Appeals for the Fourth Circuit. That appeal together with a number of other appeals involving the same issue was heard in a case entitled *Commissioner of Internal Revenue v. Gregory Run Coal Company*, 212 F.(2d) 52. The United States Court of Appeals for the Fourth Circuit reversed the decision of the Tax Court in the *J. E. Vincent* case on the question of depletion allowance for the coal stripping contractor. The court stated:

“We think the right of the strippers of the coal in these instances to share in the statutory depletion allowance is established by the decision of the Supreme Court in *Burton-Sutton Oil Co. v. Commissioner*, 328 U. S. 25.”

The court went on to analyze the decision cited and then said:

“We see no material difference between the right of the producer of the oil in the cited case to a depletion allowance and the right of the miners of the coal in the instant case to such an allowance. The fact that in the cited case the amount of the compensation of the producer was a specified percentage of the proceeds of the product, whereas in the pending case the compensation of the producer was fixed by the selling price of the coal,

adjustable to changes in the market, is not significant; nor is it of importance that in the one case the producer also sold the product whereas in the other the sale of the coal was in the hands of the assignor of the contract. In both cases the depletion was dependent upon production and in both the possibility of profit from the use by the operator of his rights over production was dependent solely upon the extraction and sale of the product and gave him an economic interest therein. As was well said by Judge Watkins in *Eastern Coal Corp. v. Yoke*, D. C. N. D. W. Va., 67 Fed. Supp. 166 (46-2 U.S. T.C. par. 9340), 'Irrespective of conveyancing formalities, one who has a right to share in coal produced, also has a corresponding interest in the coal in place.' See also *Spaulding v. United States*, D. C. S. D. Calif., 17 Fed. Supp. 957."

CONCLUSION

Under the law and evidence in this case petitioners had an economic interest in the coal in place which entitled them to percentage depletion on their gross income from severance and sale of the coal.

Respectfully submitted,

JONES & GREY

A. R. KEHOE

Counsel for Petitioners

In the United States Court of Appeals
for the Ninth Circuit

EMIL USIBELLI AND ROSE P. USIBELLI, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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MAR 31 1955

WILLIAM F. HENRY, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14559

EMIL USIBELLI AND ROSE P. USIBELLI, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 43-47) is not officially reported.

JURISDICTION

This petition for review involves deficiency in income taxes for the calendar year 1947, for Emil Usibelli in the amount of \$1,476,69, additions to tax of \$132.91, and \$88.60 for failure to file; and for Emil Usibelli and Rose P. Usibelli for the calendar year 1948, a deficiency in income tax of \$5,648.24, both as determined by the Tax Court in its decisions filed on July 6, 1954. (R. 38, 49.) The notice of deficiency

was mailed to taxpayers on December 19, 1952. (R. 8, 18.) Within the prescribed one hundred fifty-day period, on April 13, 1953, taxpayers filed petitions for redetermination with the Tax Court (R. 3-11, 13-21), under the provisions of Section 272 of the Internal Revenue Code of 1939. The decisions of the Tax Court sustaining the Commissioner's deficiency determination with respect to the issue raised on review were entered on July 6, 1954. (R. 48, 49.) The case is brought to this Court by a petition for review filed by the taxpayers on September 22, 1954 (R. 49-53), jurisdiction being conferred herein by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether taxpayers are entitled to a deduction for percentage depletion under Section 23(m) of the Internal Revenue Code of 1939 in connection with certain Alaskan coal mining operations.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

* * * * *

(m) *Depletion*.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; * * *

* * * * *

(26 U. S. C. ed., Sec. 23.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

* * * * *

(4) [as amended by Sec. 145, Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 124, Revenue Act of 1943, c. 63, 58 Stat. 21] *Percentage Depletion for Coal* * * *

(A) *In General.*—The allowance for depletion under section 23(m) shall be, in the case of coal mines, 5 per centum, * * * of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, * * *

(B) *Definition of Gross Income From the Property.*—As used in this paragraph the term “gross income from the property” means the gross income from mining. The term “mining”, as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. The term “ordinary treatment processes”, as used herein, shall include the following: (i) In the case of coal—clean-

ing, breaking, sizing, and loading for shipment;

* * *

(26 U. S. C. 1952 ed., Sec. 114.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(m)-1. DEPLETION OF MINES, OIL AND GAS WELLS, OTHER NATURAL DEPOSITS, AND TIMBER; DEPRECIATION OF IMPROVEMENTS.—Section 23(m) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements. Section 114 prescribes the bases upon which depreciation and depletion are to be allowed.

Under such provisions, the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production. Thus, an agreement between the owner of an economic interest and another entitling the latter to purchase the product upon

production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest.

* * * * *

STATEMENT

The pertinent facts herein may be summarized as follows:

The taxpayers are husband and wife.¹ They filed a joint return for 1948 and Emil filed a separate return for 1947 with the Collector of Internal Revenue for the District of Washington. (R. 43.)

Emil was engaged in coal mining operations in Alaska during the taxable years. The Secretary of the Interior of the United States granted special permission to the United States Army on April 5, 1946, to mine coal from specified Government land in Alaska. The permit provided that the Army might contract for the mining of coal for its own use by private parties. The mining here in question was done under the permit and extensions thereof. (R. 43-44.)

The Army entered into a contract with Emil, who had filed a satisfactory bond. The contract was dated July 1, 1946, and was to expire on June 30, 1947. It provided that Emil was to furnish and deliver coal for Ladd Field, Alaska, from the mine at Suntrana, Alaska. The coal was to consist of 40,000 tons of mine run and 30,000 tons of lump nut. Emil was to place the coal on railroad cars at the mine, screened and graded. A minimum of 5,600 tons was to be delivered each month. The total amount to be paid Emil was \$362,500, com-

¹ Hereafter, the singular "taxpayer" is often used to refer to both Mr. and Mrs. Usibelli, where the distinction is unimportant.

puted at \$4.75 per ton of mine run and \$5.75 per ton of lump nut. The contract provided that it could be terminated by the Government in whole, or from time to time in part, whenever the contracting officer should determine that such action would be for the best interests of the Government and it provided how settlement would be made in case of termination. The Government could terminate the contract or reduce the specified quantities to be delivered if its requirements should change. The provisions of Article 19 entitled "Price Adjustments" were as follows (R. 44-45) :

In the event that during the contract period changes should occur in working hours, wage scales, operating expense, or other conditions of employment which changes are a part of the general revision of such conditions within the producing district where the coal is mined, the parties hereto, upon the request in writing of one to the other within thirty (30) days after the effective date upon which any such change occurs, may redetermine by negotiation the unit price affected, provided that pending such negotiations the contractor shall continue deliveries hereunder. Any price redetermined as herein provided shall be applicable to all deliveries after the effective date upon which the change occurs permitting redetermination as herein provided.

Emil applied for and was granted an increase to \$5.47 per ton for mine run in September 1946 and the contract amount was correspondingly increased. The contract was changed in May 1947 to provide that all coal delivered should be mine run and to extend the

delivery date to September 30, 1947, later extended to December 31, 1947, due to curtailing of deliveries by the Army. (R. 45.)

Emil was invited to bid on the furnishing of coal to the Army for the fiscal year 1948. He submitted a bid on May 15, 1947, and was advised on May 19, 1947, that the Army intended to contract with him to furnish 70,000 tons during the period July 1, 1947, to June 30, 1948, as soon as funds were available. (R. 45.)

The President of the United States proclaimed cessation of hostilities on December 31, 1946. The Army permit to mine the coal would have expired as a result on June 30, 1947, but it was extended to December 31, 1947, and later to the effective date of a lease which might be issued for the lands. Emil had applied for a lease of the lands on May 21, 1947. A lease was granted to Emil in 1949. (R. 45-46.)

The Government, on August 25, 1947, ordered 45,000 tons of mine run, 25,000 tons of lump nut and 30,000 tons of steam and stoker coal to be delivered by Emil, pending the execution of a definite contract. The Army and Emil entered into a new contract dated July 1, 1947, covering the coal ordered on August 25, 1947, to be delivered between July 1, 1947, and June 30, 1948. The amount to be paid Emil was \$577,000, computed at \$5.22 per ton of mine run and \$6.22, per ton for the other grades. The other provisions of the contract were substantially the same as those in the earlier contract. The performance time was later extended to July 31, 1948. (R. 46.)

Emil conducted mining operations under the contracts and the order during the taxable years. The Commissioner disallowed claimed depletion deductions

of \$5,596.54 for 1947 and \$8,026.71 for 1948 with the explanation that Emil had no economic interest in the coal in place that he was mining for the United States Army. The Tax Court sustained the Commissioner of Internal Revenue and this appeal resulted. (R. 46.)

SUMMARY OF ARGUMENT

Under the cases and Section 29.23(m)-1 of the Regulations, an owner of an economic interest in mineral deposits is allowed annual depletion deductions. In *Burton-Sutton* this interest was said to be the possibility of profit from the use of rights over production dependent solely upon the extraction and sale of the mineral. Here, the taxpayers did not acquire economic interests in the coal under the contract with the Army because the coal belonged at all times to the United States Government. Under the statute the Secretary of the Interior has authority to grant leases to unreserved coal lands in Alaska but taxpayer did not receive his lease until 1949, after the taxable periods here involved. Emil was merely employed on an annual basis to mine and load the coal for use by the Army. The coal was never sold. Emil was paid an agreed amount for the work which he performed. His payments depended upon mining costs rather than upon any sales or market prices. Recovery of his unamortized investment costs could be had from the successful bidder at a contemplated public auction. He could mine only limited quantities of coal and the amount could be reduced by the Government. Furthermore, the contracts could be terminated by the Government whenever the contracting officer determined that such action was in the best interests of the Government.

Thus, the decision of the Tax Court herein is correct and should be affirmed.

ARGUMENT

The Tax Court Correctly Held That Taxpayers Herein Are Not Entitled to a Deduction for Percentage Depletion in Connection with Certain Alaskan Coal Mining Operations

A. A depletion allowance of 5 per cent is allowed on the gross income from coal property

The provisions of the 1939 Internal Revenue Code and of the Regulations issued thereunder which are pertinent to this proceeding can be briefly summarized as follows: Section 23(m) of the Internal Revenue Code, *supra*, provides that there shall be allowed as a deduction in computing net income in the case of mines, a reasonable allowance for depletion. Section 114(b)(4) of the Code, *supra*, enlarges on this by providing specifically that percentage depletion for coal mines shall be 5 per centum "of the gross income from the property * * *, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer."

Section 29.23(m)-1 of Treasury Regulations 111, promulgated under the Internal Revenue Code, *supra*, provides that the owner of an economic interest in mineral deposits is allowed annual depletion deductions, and defines "economic interest" by stating that such an interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place and secures, by any form of legal relationship, income derived from the severance and sale of the mineral, to which he must look for a return of his capital.

B. *An owner of an economic interest in a mineral property is entitled to his equitable proportion of the 5 per cent depletion allowance*

The issue in this case is simply whether taxpayer is entitled to a percentage depletion allowance on the payments made by the Army to him at varying specified rates per ton mined.² The theory underlying the deduction for depletion was explained in *Kirby Petroleum Co. v. Commissioner*, 326 U.S. 599, 602-603, as follows:

The present provisions for depletion allowances have been worked out so as to give the holder of an economic interest in the oil or other natural resource an allowance for depletion. While there are income incidents to the utilization of natural resources, there is also an obvious exhaustion of the capital used to produce the income. In theory the aggregate sum allowed for depletion would equal the value of the natural resource at the time of its acquisition by the taxpayer, so that at the exhaustion of the resource the taxpayer would have recovered through depletion exactly his investment. The administrative difficulties in taxation

² From July 1, 1946, to June 30, 1947, the coal was to consist of 40,000 tons of mine run at \$4.75 per ton and 30,000 tons of lump nut at \$5.75 per ton, total price being \$362,500. (R. 44.) In September, 1946, the price for mine run was increased to \$5.47 per ton. (R. 45.) On August 25, 1947, the Army ordered 45,000 tons of mine run, and 25,000 tons of lump nut and 30,000 tons of steam and stoker coal. A contract was subsequently executed, back-dated to July 1, 1947, covering the coal to be delivered in the 1948 fiscal year. The total amount was \$577,000, computed at \$5.22 per ton of mine run and \$6.22 per ton for the other grades. (R. 46.)

of oil and gas production in view of the uncertainties of quantities and time of acquisition, that is at the purchase of the property or at the discovery of oil or gas, finally have brought Congress to the arbitrary allowance of $27\frac{1}{2}$ per cent now embodied in §114(b)(3). Thus, the $27\frac{1}{2}$ per cent is appropriated by the statute to the restoration of the taxpayer's capital and the rest of the proceeds of the natural asset becomes gross income. *Anderson v. Helvering*, 310 U.S. 404, 407-8. It follows from this theory that only a taxpayer with an economic interest in the asset, * * * [here, the coal], is entitled to the depletion. *Palmer v. Bender*, 287 U.S. 551, 557; *Thomas v. Perkins*, 301 U.S. 655, 659.

Because only a taxpayer with an economic interest is entitled to percentage depletion (*Commissioner v. Southwest Exploration Co.*, decided by this Court on March 7, 1955), the question in each case where such allowance is claimed is: Does the taxpayer have an economic interest in mineral property producing the income, which interest is necessarily exhausted as the mineral is extracted?

C. *Taxpayer did not receive an economic interest under the terms of the particular contract by which he was hired by the Army to mine coal at a specified rate per ton on Government land*

It is well settled that an economic interest in a mineral property does not mean title to, or ownership of, the mineral deposit. *Lynch v. Allworth-Stephens Co.*, 267 U.S. 364; *Burnet v. Harmel*, 287 U.S. 103; *Kirby Petroleum Co. v. Commissioner*, 326 U.S. 599. 602 A 5

the Supreme Court has said, the statute extends to (*Palmer v. Bender*, 287 U.S. 551, 557)—

every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital.

In the Court's most recent decision dealing with depletion, *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25, it has further clarified the nature of an economic interest in a mineral property. It has stated that what marks such an interest in a taxpayer is the (pp. 34-35)—

“possibility of profit” from the use of his rights over production, “dependent solely upon the extraction and sale of the oil,” [~~Italics supplied.~~]

As the Court points out in the *Burton-Sutton* case, it has not been deemed significant from the federal tax viewpoint what the instrument creating the rights is. (P. 32.) It is also “unimportant” what the cost of such rights ^{was} were to the taxpayer. (P. 34.) To have an economic interest the taxpayer must possess “valuable benefits arising from and dependent upon the extraction of the oil [or coal]” as consideration for granting to him “control over the exploitation of the land.” (P. 33.)

In this case, the possession of the right by the taxpayer to receive a specified dollar amount per ton of coal mined for the Army on Government land (managed by the Department of Interior) does not qualify as the ownership of a depletable economic interest in the mineral in place. *Helvering v. Bankline Oil Co.*,

303 U.S. 362; cf. *Commissioner v. Gregory Run Coal Co.*, 212 F. 2d 52 (C.A. 4th), certiorari denied, 348 U.S. 828.³ Taxpayer's remuneration herein is not "dependent solely upon the extraction and sale" of the coal. Rather taxpayer is being compensated for labor performed in relation to a mineral which the Government already owns, albeit in the ground. Taxpayer is not sharing in the market risks of a rise or fall of the ultimate sales price. *Ruston v. Commissioner*, 19 T.C. 284. *Brown v. Commissioner*, 22 T.C. 58. At most, taxpayer is a hireling bound to do the Army's bidding within the terms of the contract.

The application to strip miners of the general depletion principles, laid down by the Supreme Court, has been a troublesome problem. In G.C.M. 26290, 1950-1 Cum. Bull. 42, the Internal Revenue Service has attempted to lay down certain guides as to whether strip mining contractors come within these general principles. The Tax Court has generally approved these tests. *Ruston v. Commissioner*, *supra*. G.C.M. 26290 provides (p. 45) that a stripping contractor is entitled to a depletion allowance only where he "obtains a capital interest in the mineral in place and must look to the severance and sale of the mineral for the return of his capital consumed in that process." If the contract may be cancelled either at will or with nominal notice by the coal company [*i.e.* here the Army], there is no capital or depletable economic interest in the stripping contractor.

³ We believe that *Morrisdale Coal Mining Co. v. Commissioner*, 19 T.C. 208 (pending on appeal, C.A. 3d); *Mammoth Coal Co. v. Commissioner*, 22 T.C. 571 (pending on appeal, C.A. 3d), are distinguishable on their facts.

Article 8a of the contract between the Army and the taxpayer (Ex. 3-C, Appendix, *infra*),⁴ by its specific terms provides that "performance of work under this contract may be terminated by the Government in accordance with this Article in whole, or from time to time in part, whenever the contracting officer shall determine any such termination is for the best interests of the Government." Contrary to taxpayer's implication (Br. 10), the subsequent provisions in Article 8 do not limit the right of the Army to terminate the contract but allows the contracting officer to exercise the option whenever he believes such termination to be for the best interests of the Government. The later provisions of Article 8 merely specify the procedures to be followed in accomplishing the termination. Even a termination occurring at the time of a general termination is to be in accord with the provisions of Article 8 unless the taxpayer "is then in gross or wilful default under" the contract, in which case it can be assumed he will have forfeited any rights previously held under the contract. Article 8, considered in the light of G.C.M. 26290, dramatically highlights the lack of merit in taxpayer's contention that he had a capital interest in coal that was owned continuously by the Government.⁵ *Morrisdale Coal Mining Co. v. Commissioner, supra*, p. 216.

Article 18 (Ex. 3-C, Appendix, *infra*), provides for (1) the termination of the contract; (2) the reduction without liability of the quantities of coal to be received

⁴ The second contract (Ex. 14-N) is not set forth inasmuch as its pertinent provisions are similar to those of Ex. 3-C.

⁵ Taxpayer has not, indeed he cannot, point to any transaction by which he obtained title to any coal during the fiscal years here involved.

by the Government; or (3) the directing of shipment to other destinations, in the event certain contingencies occur. Being thus subject to the control of the Army as to the quantity of coal to be mined, it cannot be contended that taxpayer had the requisite "control over the exploitation of the land." See *Burton-Sutton*, p. 33.

Even assuming *arguendo*, that this contract is not terminable at will, taxpayer still does not have an economic interest here since he is not dependant upon the actual mineral itself, or the proceeds of the sale thereof, for his remuneration for his labor. *Anderson v. Helvering*, 310 U.S. 404. Rather, taxpayer can look to the general credit of the United States Government for payment. Furthermore, taxpayer has an additional source available for the recovery of his capital investment. A public auction of this self-same land for lease was contemplated. (Ex. 11-K, R. 36-38.) If and when the lease was granted, the successful bidder (if not the taxpayer) was to have been required to repay taxpayer for his capital then invested in the subject mineral property. In reality, taxpayer was thus not restricted, in the recovery of any remaining investment in the mining operation, to the mineral itself or the proceeds thereof—a prerequisite to the possession of an economic interest under the decisions. See *supra*.

The Secretary of the Interior has authority to grant leases to unreserved Alaskan coal lands and coal deposits. 48 U.S.C. 1952 ed., Sec. 434. In the instant case, no lease was issued to taxpayer by the Secretary until 1949. However, the Secretary did grant a permit to the Army to have the subject coal mined for its own

use by private parties. (Ex. P, R. 39-40, 44) There has been no suggestion here that this permit was ever assigned. Rather, under the authority of the permit from the Secretary of the Interior the Army granted **limited** one-year permits in its own name to the taxpayer to mine coal for its (the Army's) own use. In substance the taxpayer had a contractual relationship with the Army, but no real control over production. Briefly, the taxpayer lacked an economic interest herein because: (1) the subject contracts were for very limited periods of time—one year; (2) the Army had the power of termination at will; (3) recovery of capital by taxpayer could be accomplished from a source other than the mineral itself or the proceeds from the sale thereof; (4) the coal actually produced was the property of the Government at all times and hence not available for sale by the taxpayer.

As we understand taxpayer's argument, he is contending (1) that the contracts involved herein are not terminable at will (Br. 9-10) and (2) that taxpayer sold the coal herein to the Army (Br. 16-19). We have discussed the fallacy of number 1, *supra*. Taxpayer's second contention is equally without merit. At no point in this proceeding has taxpayer produced a purchase agreement, bill of sale, or other document by which either title or any equitable interest to the subject coal herein was transferred from the Government to taxpayer.⁶ Absent title and equitable interest in taxpayer, it is impossible for him to claim a sale to the Army, of

⁶ The fact that certain "boiler-plate" provisions were ineptly lifted *in toto* from standard government purchase contracts for use in hiring Emil is insufficient to put title to the coal in his hands at any time.

coal which is already owned by the United States Government.

The Tax Court succinctly summarized this case as follows (R. 46-47):

The coal belonged at all times to the United States Government. Emil was merely employed on an annual basis to mine and load the coal for use by the Army. The coal was never sold. Emil was paid an agreed amount for the work which he performed. The record does not show that his payments depended upon any sales or market prices of the coal but indicates that they depended upon mining costs. The fact that Emil was applying for a lease is immaterial since he was not a lessee during the taxable years. He could mine only limited quantities of coal and the amount could be reduced by the Government. The contracts could be terminated by the Government under certain circumstances.

CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

H. BRIAN HOLLAND,

Assistant Attorney General.

ELLIS N. SLACK,

LEE A. JACKSON,

ROBERT B. ROSS,

*Special Assistants to the
Attorney General.*

MARCH, 1955

APPENDIX

Excerpts from Exhibit No. 3-C

Headquarters Alaskan Department

OFFICE OF THE QUARTERMASTER

APO 942, % Postmaster, Seattle, Washington

Contract No. W 7500 qm-24

O. I. No. C-47-2

SUPPLY CONTRACT

WAR DEPARTMENT

Contractor & Address: Emil Usibelli, Suntrana, Healy Forks, Alaska.

Contract for: Coal for Ladd Field, Alaska.

Amount: \$362,500.00.

Location: Mine located at Suntrana, Alaska.

Payment: To be made by Finance Officer, Ladd Field, Alaska.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following allotment, the available balance of which is sufficient to cover the cost of the same: 2170905 793-9 ESA P439-08 S501-009.

This contract is authorized by and entered into under Public 703, 76th Congress, approved 2 July 1940, the First War Powers Act, 1941, and Executive Order No. 9001 (27 December 1941).

CONTRACT FOR SUPPLIES

THIS CONTRACT, entered into this *1st day of July 1946*, by the UNITED STATES OF AMERICA (hereinafter

called the Government) represented by the Contracting Officer executing this contract, and an Individual trading as EMIL USIBELLI of Healy, in the Territory of Alaska (hereinafter called the Contractor), witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Scope of this Contract—The Contractor shall furnish and deliver Coal in the quantities and at the prices specified in Schedule of Supplies, part hereof, for the consideration stated, \$362,500.00, in strict accordance with the Schedule of Supplies which is made a part hereof and designated as follows: Schedule of Supplies.

* * * * *

ARTICLE 8. Termination at the Option of the Government—

a. The performance of work under this contract may be terminated by the Government in accordance with this Article in whole, or from time to time in part, whenever the contracting officer shall determine any such termination is for the best interests of the Government. Termination of work hereunder shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract shall be terminated, and the date upon which such termination shall become effective. If termination of work under this contract is simultaneous with, a part of, or in connection with, a general termination (1) of all or substantially all of a group or class of contracts made by the War Department for the same product or for closely related products, or (2) of war contracts at, about the time of, or

following, the cessation of the present hostilities, or any major part thereof, such termination shall only be made in accordance with the provisions of this Article, unless the contracting officer finds that the contractor is then in gross or wilful default under this contract.

b. After receipt of a Notice of Termination and except as otherwise directed by the contracting officer, the contractor shall (1) terminate work under the contract on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portions of the work under the contract as may not be terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of any work terminated by the Notice of Termination; (4) assign to the Government, in the manner and to the extent directed by the contracting officer, all of the right, title and interest of the contractor under the orders or subcontracts so terminated; (5) settle all claims arising out of such termination of orders and subcontracts with the approval or ratification of the contracting officer to the extent that he may require, which approval or ratification shall be final for all the purposes of this Article; (6) transfer title and deliver to the Government in the manner, to the extent and at the times directed by the contracting officer (i) the fabricated or unfabricated parts, work in process, completed work, supplies and other material produced as a part of, or acquired in respect of the performance of, the work terminated in the Notice of Termination, and (ii) the plans, drawings, information and other property which, if the contract had

been completed, would be required to be furnished to the Government; (7) use his best efforts to sell in the manner, to the extent, at the time, and at the price or prices directed or authorized by the contracting officer, any property of the types referred to in subdivision (6) of this paragraph provided, however, that the contractor (i) shall not be required to extend credit to any purchaser and (ii) may retain any such property at a price or prices approved by the contracting officer; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary or as the contracting officer may direct for protection and preservation of the property, which is in the possession of the contractor and in which the Government has or may acquire an interest.

c. The Contractor and the contracting officer may agree upon the whole or any part of the amount or amounts to be paid to the contractor by reason of the total or partial termination of work pursuant to this Article, which amount or amounts may include a reasonable allowance for profit, and the Government shall pay the agreed amount or amounts. Nothing in paragraph (d) of this Article prescribing the amount paid to the contractor in the event of failure of the contractor and the contracting officer to agree upon the whole amount to be paid to the contractor by reason of the termination of work pursuant to this Article shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the contractor pursuant to this paragraph (c).

d. In the event of the failure of the contractor and contracting officer to agree as provided in paragraph c

upon the whole amount to be paid to the contractor by reason of the termination of work pursuant to this Article, the Government, but without duplication of any amounts agreed upon in accordance with paragraph c, shall pay to the contractor the following amounts:

(1) For completed articles delivered to and accepted by the Government (or sold or retained as provided in paragraph b (7) above) and not theretofore paid for, forthwith a sum equivalent to the aggregate price for such articles computed in accordance with the price or prices specified in the contract;

(2) In respect of the contract work terminated as permitted by this Article, the total (without duplication of any items) of (i) the cost of such work exclusive of any cost attributable to articles paid or to be paid for under paragraph d (1) hereof; (ii) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders as provided in paragraph b (5) above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the notice of termination of work under this contract which amounts shall be included in the cost on account of which payment is made under subdivision (i) above; and (iii) a sum equal to two per cent of the part of the amount determined under subdivision (i) which represents the cost of articles or material not processed by the contractor, plus a sum equal to six per cent of the remainder of such amount, but the aggregate of such sums shall not exceed six per cent of the whole of the amount determined under subdivision (i), which for

the purpose of this subdivision (iii) shall exclude any charges for interest on borrowings:

(3) The reasonable cost of the preservation and protection of property incurred pursuant to paragraph b (9) hereof; and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the contractor as the result of the termination of work under this contract.

The total sum to be paid to the contractor under subdivisions (1) and (2) of this paragraph d shall not exceed the total contract price reduced by the amount of payments otherwise made and by the contract price of work not terminated. Except for normal spoilage and to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the contractor as provided in paragraph d (1) and paragraph d (2) (i), all amounts allocable to or payable in respect of property, which is destroyed, lost, stolen, or damaged so as to become undeliverable prior to the transfer of title to the Government or to a buyer pursuant to paragraph b (7) or prior to the 60th day after delivery to the Government of an inventory covering such property, whichever shall first occur.

e. The obligation of the Government to make any payments under this article: (1) shall be subject to deductions in respect of (i) all unliquidated partial or progress payments, payments on account theretofore made to the contractor and unliquidated advance payments, (ii) any claim which the Government may have against the contractor in connection with this contract, and (iii) the price agreed upon or the proceeds of sale

of any materials, supplies or other things retained by the contractor or sold, and not otherwise recovered by or credited to the Government, and (2) in the discretion of the contracting officer shall be subject to deduction in respect of the amount of any claim of any subcontractor or supplier whose subcontract or order shall have been terminated as provided in paragraph b (3) except to the extent that such claim covers (i) property or materials delivered to the contractor or (ii) services furnished to the contractor in connection with the production of completed articles under this contract.

f. In the event that, prior to the determination of the final amount to be paid to the contractor as in this article provided, the contractor shall file with the contracting officer a request in writing that an equitable adjustment should be made in the price or prices specified in the contract for the work not terminated by the Notice of Termination, the appropriate fair and reasonable adjustment shall be made in such price or prices.

g. The Government shall make partial payments and payments on account, from time to time, of the amount to which the contractor shall be entitled under this Article, whether determined by agreement or otherwise, whenever in the opinion of the contracting officer the aggregate of such payments shall be within the amount to which the contractor will be entitled hereunder.

h. For the purposes of paragraphs d(2) and d(3) hereof, the amounts of the payments to be made by the Government to the contractor shall be determined in accordance with the statement of Principles for Determination of Costs upon Termination of Government Fixed Price Supply Contracts approved by the Joint Contract Termination Board, December 31, 1943, as

amended by Regulation No. 5 of the Office of Contract Settlement, dated September 30, 1944. The contractor for a period of three years after final settlement under the contract shall make available to the Government at all reasonable times at the office of the contractor all of its books, records, documents, and other evidence bearing on the costs and expenses of the contractor under the contract and in respect of the termination of work thereunder.

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ARTICLE 18. Variation from Quantity Specified—

a. The quantities of each item specified are based on present requirements, and it is expressly agreed that should the consuming point be abandoned or the consumption thereat be reduced or burning equipment be altered, or should the Government desire to reload and ship excess of surplus from storage at other Army installations to the consuming point or points herein named, the Government upon notices to the contractor given in writing, reserves the right to (1) terminate the contract, (2) reduce correspondingly the quantities to be furnished hereunder without liability to the Government other than to pay the contract price for all coal delivered, or (3) direct the shipment of coal contracted for hereunder to other destinations as provided elsewhere herein.

b. In the event of such decrease in quantities to be furnished hereunder, any coal actually loaded and quantities en route prior to receipt of such notice by the contractor shall be accepted if they conform in all respect to the contract provisions.

c. In performing this contract the quantities specified shall not be exceeded except by such quantities as may be necessary to make final shipments a full carload.

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IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA
By BENARD PETERS, CAPT. CE
Purchasing and Contracting Officer.
EMIL USIBELLI.

Two Witnesses:

LOIS L. GAY,
P. O. Box 2017, Fairbanks, Alaska.
G. A. GUSTAFSON,
P. O. Box 1370, Fairbanks, Alaska.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT.

No. 14,559.

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decisions of the Tax Court of
the United States.

BRIEF FOR AMICI CURIAE.

RICHARD L. LEVY,
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FILED

APR 15 1955

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT.

No. 14559.

EMIL USIBELLI AND ROSE P. USIBELLI,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR AMICI CURIAE.

The instant case represents the second occasion on which an Appellate Court has been faced with this important question:

Is a strip-miner of coal which mines pursuant to a contract giving him the exclusive right to extract coal from particular property, entitled to a share of the percentage depletion allowance where its gross income is dependent upon the extraction of the coal but not upon its ultimate sale price?

On the first occasion, the Court of Appeals for the Fourth Circuit answered the question in the affirmative. *Commissioner v. Gregory Run Coal Co.*, 212 F. 2d 52 (4th Cir., 1954), *cert. denied*, 348 U. S. 828.¹ The purpose of

1. There are factual differences between the instant case and the *Gregory Run Coal Co.* case, *supra*, involving such matters as the provision in the contract limiting the amount of coal to be strip-mined and the Army's right to terminate the contract under certain circumstances. These factors are immaterial, as discussed in the latter portion of this brief.

amici curiae here is to urge the adoption by this Court of that same position and to present the fundamental question of such a strip-miner's right to depletion in its simplest and clearest form, free of all subsidiary factual problems.

I.

Our contention is threefold:

First: That Congress gave the right to percentage depletion to any taxpayer which derives its income from mining mineral property in which it owns an "economic interest" in the mineral in place;

Second: That a strip-miner which by contract has the right to extract coal from particular property and which is paid if, and only if, and when the coal is extracted, thereby assuming all the risks inherent in finding and getting the coal out of the ground has such an interest, even though it does not have legal or equitable title to the property; and

Third: That the question of whether a strip-miner has such an economic interest is not in any way affected by the market conditions of the coal business; in other words the disposition of the coal after its discovery, extraction and delivery pursuant to contract by the strip-miner is of no significance with regard to the existence in the first instance of an economic interest subject to depletion.

There is no difference of opinion on the first proposition. The Tax Court apparently agrees to the second as well, provided an additional factor of its own making exists, namely that the strip-miner's compensation be contingent upon the sale² of the coal.

2. The use of the words "and sale" as part of the phrase "reliance upon extraction and sale" in depletion cases, apparently developed somewhat accidentally as a result of the fact that in so many instances, the payment involved was by lease or contract fixed in terms of the sale price by the operator (usually a lessee). Reference to sale in many of the cases has therefore been purely descriptive of the factual situation before the court. Prior to the Tax Court's preoccupation with the term, however, it was never used as a *sine qua non*

That this is so is readily apparent from an analysis of five recent Tax Court decisions on the point,³ including the instant case. In *James Ruston*, 19 T. C. 284 (1952), the strip-miner derived his gross income from mining in the form of a percentage of the sales price of the coal. In the other four cases—the instant case, *B. H. Swaney & Sons, Inc.*, 12 T. M. C. 1371 (1953), *reversed on appeal sub nom., Commissioner v. Gregory Run Coal Co., supra*, *Morrisdale Coal Mining Co.*, 19 T. C. 208 (1952), and *J. E. Vincent*, 19 T. C. 501 (1952), *reversed on appeal sub nom., Commissioner v. Gregory Run Coal Co., supra*—the Tax Court found that the coal stripper was paid a fixed amount per ton of coal mined and delivered. In all other essential respects the relationship between the coal company and strip miner in these five cases was similar.

In *Ruston*, it was held that the strip-miner had an “economic interest” and was entitled to the percentage depletion allowance. In the other four cases, the Tax Court

of the existence of an economic interest. Where the question of reliance on sale was actually in issue, it has been rejected as being without significance. *Eastern Coal Corporation v. Yoke*, 67 F. Supp. 166 (N. D. W. Va., 1946); *Commissioner v. Gregory Run Coal Co., supra*; see also Revenue Ruling 54-548, Internal Revenue Bulletin No. 48, November 29, 1954, where a lessor was paid a royalty measured by production only and no reference is made to reliance upon sale by the lessee.

The most recent example of a descriptive (but not limiting) use of the phrase “extraction and sale” is *Commissioner v. Southwest Exploration Co.*, — F. 2d — (9th Cir., 1955), *affirming per curiam*, 18 T. C. 961. The question there was whether taxpayer had to exclude from its gross income from the production of oil the percentage of its net profits which it was required to pay under the lease to other parties. As indicated, the phrase “extraction and sale” was the usual descriptive phrase to use in setting forth the facts before the court. It had no other significance.

3. Despite the *Gregory* decision, the Tax Court apparently considers its distinction based on payment out of or contingent on sale, to be firmly established. Its more recent decisions tend simply to say that the facts fall within one group or another depending upon reliance upon sale. This superficial analysis was the basis of the decision in the instant case. See also *The Mammoth Coal Company*, 22 T. C. No. 73 (1954); *Winfield Mining and Contracting Company*, 13 T. C. M. 571 (1954).

reached a contrary conclusion. In denying the deduction to the strip-miner the court used this language in the *Morrisdale* case:

“The contractors [strip-miners] assumed no risk as to the market price, they received no payment in coal, and they had no right to sell any coal to other parties.” 19 T. C. at 217

Likewise in the instant case in denying the depletion allowance to the strip-miner the Tax Court said:

“The record does not show that his payment depended upon any sales or market prices of the coal but indicates that they depended upon mining costs.” (R. 47)

Thus the existence or non-existence of an “economic interest” in the coal in place was made to turn on whether the strip-miner’s income was based upon a percentage of the sale price, on a question involving the status of the coal market at a particular time, on a question of salesmanship which has nothing whatsoever to do with mining. This is a condition of the Tax Court’s own invention—a condition the only other Appellate Court to consider the question held to be wholly erroneous. *Commissioner v. Gregory Run Coal Co.*, *supra*. The existence in the first instance of an economic interest in coal in place should in no way depend upon whether the strip-miner’s economic interest in the coal continues *after* it has been discovered and mined and turned over to the coal company for sale.

Thus as stated above, the Tax Court has added its own condition to the depletion allowance—that the strip-miner assume the risk as to the market price by having his compensation depend on the sales price of the coal. But the condition of the coal market is no more significant than the condition of the automobile market or the furniture market and so on. Yet that factor—whether or not the strip-miner’s income is contingent upon the actual sales price of the coal on the coal market—is the basic premise to which

the Tax Court has pegged the strip-miner's right to depletion.

It is our position that this reliance upon a risk which has nothing to do with mining is erroneous. We believe that it is an error of substance which flows from a basic misconception of the fundamental nature and purpose of percentage depletion. That allowance is the outgrowth of a history which is of obvious significance to a proper understanding of its legislative purpose. To the extent relevant here, that history can be summarized briefly.

The first statutory provision took the form of cost depletion. Because natural resources inevitably are exhausted, the owner of those resources was allowed to recover his cost (or March 1, 1913 value, if higher than cost). This allowance involved but two elements: ownership, and proof of cost or March 1, 1913 value. See *United States v. Ludey*, 274 U. S. 295 (1927). This allowance was extended to a lessee by judicial decision in *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364 (1925), dealing with the Revenue Act of 1916. The Revenue Act of 1918 (Section 214) specifically provided for an equitable division of the cost depletion allowance between lessor and lessee.

That same Act contained also the first step away from the conventional concept of depletion as a method of recovering cost. The new approach resulted from the legislative desire to encourage operations designed to get the coal above the ground. By way of inducement and reward for the exploration of mineral deposits discovered after acquisition of the property, the basis for determining depletion was the value of those newly discovered resources. "To stimulate prospecting and exploration", Sections 214(a)(10) and 234(a)(9) provided for a limited tax on the sale of certain mineral producing properties and for depletion based on discovery value. Senate Report No. 619, 65th Cong., 3d Sess., 1939-1, Part 2, Cum. Bull. pp. 121, 122. As Senator Reed stated in the debates on the Revenue Act of 1926:

“If we were to calculate the depletion at some fixed percentage of the cost of the property that would not occur. But ever since early war days Congress has followed the policy of allowing what they call discovery value for both oil and gas wells and for minerals. It is perfectly obvious that if I buy an acre of land in the Rocky Mountains and pay \$10 for it, and then, by hard work, discover a rich deposit of gold in it, the calculation of my depletion on the original \$10 basis would not allow me any adequate return for my real capital. So, in allowing what is called discovery value, Congress and the bureau have tried to get at the real but the unknown value of the property owned by the taxpayer. . . .” See 67 Cong. Rec. 3561-78.

The full significance of the true purpose of the allowance is reflected also in the statement made in reporting the discovery provision in the Revenue Act of 1926:

“Under the existing law, discovery depletion is allowable to one who brings in a well upon property proven at the time the well is brought in, if at the time it was purchased by the taxpayer it was not proven. Obviously the benefits of discovery depletion, the purpose of which was to encourage the wildcatter or pioneer, should be limited to those who make an actual discovery.” See 69th Cong., 1st Sess. H. R. Rep. No. 1, p. 6; 1939-1 (Part 2) Cum. Bull. 319.

But this new concept, unrelated to cost, involved burdensome administrative difficulties in proving the value of the newly discovered mineral deposits. Accordingly, retaining the fundamental idea that cost was not an integral part of any depletion allowance, Congress conceived of the idea of percentage depletion. This first appeared in the Revenue Act of 1926 as to income from oil and gas wells and was extended to coal mining in 1932. As an inducement to the miner, percentage depletion could be taken so long as gross income was derived from the mining operation, despite the fact that the allowance resulted in a deduc-

tion many times the amount originally invested or the mine's discovery value at the time the mining operation began. This fundamental aspect of percentage depletion was restated only as recently as 1951 by Senator Humphrey:

“Under the present law, the amount of percentage depletion bears no relation to the capital cost of the property, but only to the income. . . . [S]ince the percentage depletion allowances are unrelated to the capital the tax-free recoveries through percentage depletion are often many times the original investment.”
97 Cong. Rec. 12307.

Finally, Congress showed further need to induce mining by allowing percentage depletion without regard to whether the mine represented a new discovery. See 4 Mertens' Law of Federal Income Taxation, § 24.31a (1954).

This brief analysis of legislative history discloses two things:

First, that percentage depletion has nothing whatsoever to do with recovery of cost or any other investment in the ordinary sense to acquire the particular natural resource involved. Thus when the cases speak about the taxpayer being permitted to “recover” his “investment” or “capital”, it is obvious that they are referring not to a cost or capital outlay made by the taxpayer to acquire the right to receive the coal, but rather what the taxpayer acquired by signing the binding contract which conferred upon him the exclusive right to extract the coal in place. See *e.g.*, *James Ruston, supra*.

Second, that the purpose behind percentage depletion is to encourage coal mining by providing a special tax benefit to those persons who actually extract the coal and take the risks inherent in mining (not the risks of the market). This is accomplished by allowing a deduction from the taxpayer's gross income derived from mining.

The significance—or more accurately the lack of any significance—of the strip-miner's “gross income from min-

ing” being dependent upon the sales price is conclusively demonstrated by the statutory definition of “gross income from mining.” Section 114(b)(4)(B) of the Internal Revenue Code (1939), provides that mining is considered to include, “not merely the extraction of the ores or minerals from the ground” but also the subsequent ordinary treatment processes necessary to obtain the commercially marketable product as well as certain transportation costs. No reference whatsoever, however, is made to the sale of the mineral. The inclusion of the subsequent processes, of course, does not mean that a taxpayer who assumes the risk inherent in the basic job—i.e., extraction of the ore—is denied percentage depletion because he is not *also* involved in the fringe and later processes which are also given the benefit of percentage depletion. Rather these subsequent processes are specifically included so as to make it clear that the gross income upon which the deduction is based is not limited solely to that derived from the extraction.

The vice in the Tax Court’s position is that not only does it tack on the selling process, found nowhere in the Code, but it makes that process a *sine qua non* of enjoyment of percentage depletion for those taxpayers who perform extraction *and* some or all of the other activities specifically set forth in the statute.

The same point is further illustrated by the decision in *Eastern Coal Corporation v. Yoke*, 67 F. Supp. 166 (N. D. W. Va., 1946). In that decision, which has been cited many times, the court held that a strip-miner who under contract extracted the coal and was compensated by a fixed sum per ton of coal had the “economic interest” entitling it to a deduction for percentage depletion from the compensation so received.

The court commented further that it had not found “a single case among the many cases involving percentage depletion where the actual producer has been denied percentage depletion with respect to his interest in the proceeds of the mineral produced.” (At p. 177)

Respondent in March 1950 issued a General Counsel Memorandum, G. C. M. 26290, 1950-1 Cum. Bull. 42, dealing with a strip-miner's right to depletion. Much reliance was placed upon *Eastern Coal Corporation v. Yoke, supra*, which was cited with approval in this manner:

“It is also to be noted that in *Eastern Coal Corporation v. Yoke, supra*, the position was taken by the court that the right of a contractor to a specified amount per ton of mineral produced may constitute a right to share in production which marks ownership of a depletable economic interest in the mineral in place.”

We believe the Tax Court clearly recognized that the percentage depletion allowance was intended as a reward to the miner who takes the risks inherent in mining. It failed to realize, however, that the risk of the market is obviously not one peculiar to the extractive industries, but is existent in every commercial activity; and that the assumption of this market risk is not one of the risks which Congress intended to reward.

This was the basis of decision in *Commissioner v. Gregory Run Coal Co., supra*, which, as already stated, is the only Appellate Court decision on the question. The Court there specifically rejected the argument that the existence of the strip-miner's economic interest (and thus his right to participate in depletion) depended upon his assuming in some way the risk of the market. Instead the Court found an economic interest in and awarded the right to participate in depletion to a strip-miner who was paid on a fixed sum-per-ton basis. Relying upon *Eastern Coal Corporation v. Yoke, supra*, the Court said:

“We think, however, that in the pending case the rights of the producers were completely dependent upon the extraction of the salable product and that consequently they were entitled to share in the benefits of

the statute which were designed to give compensation to persons interested in the production of a wasting asset." (p. 61) (italics supplied)

In other words, the right to depletion exists whenever the taxpayer's income is dependent upon the risks inherent in finding and extracting the coal, not those risks inherent in selling it.

The legislative history, the express language of the Code, the court decisions, such as *Commissioner v. Gregory Run Coal Co.*, *supra*, and *Eastern Coal Corporation v. Yoke*, *supra*, the soundness of the latter being expressly recognized by Respondent, all conclusively show the error of the Tax Court in making the existence of an economic interest and the allowance for percentage depletion turn on whether or not the strip-miner derives and measures its compensation from the ultimate sale price or profit derived from the sale of the coal.

The sole question is whether a strip-miner, who in a particular case has by contract acquired an exclusive right to extract coal on a particular property, is the taxpayer whom Congress intended to benefit for assuming the risks inherent in the mining operations. Strip-miners just like any other coal producers, or any drillers or prospectors for natural resources, run the risks inherent in the operation. It is they who bring in their own expensive mining equipment and employees; who build roads and other improvements required to proceed with the mining; who pay taxes and all other obligations involved. It is the strip-miner, who after assuming all these risks and burdens runs the basic risks that the coal field is barren or that the coal is not merchantable. *These are the risks peculiar to mining and to which the depletion allowance was directed.* Once the coal is above the ground, the risks are those of sale, a problem inherent in all businesses and, therefore, not warranting a special reward.

II.

The previous discussion demonstrates the complete lack of significance of reliance upon sale in connection with the determination of the existence of an economic interest. The purpose of this portion of our brief is to establish that the right to cancel or limit the tonnage to be mined is equally insignificant.

The Tax Court felt otherwise. It said:

“[The stripper] . . . could mine only limited quantities of coal and the amount could be reduced by the Government. The contracts could be terminated by the Government under certain circumstances.” (R. 47)

It is our position that these facts are completely irrelevant to the only question here involved: does the strip miner have an economic interest? As indicated above (page 2) it is agreed, even by the Tax Court, that such an interest may exist in the case of “a strip miner which by contract has the right to extract coal from particular property and which is paid if and only if and when the coal is extracted, thereby assuming all the risks inherent in finding and getting the coal out of the ground . . . even though it does not have legal or equitable title to the property.”⁴

It is our position that the existence of this economic interest is not affected by such quantitative factors as the amount of coal to be mined and the period of time during which the stripper is allowed to continue his operations. Once the economic interest is determined to exist, then the question (not here involved) of the amount of the depletion allowance becomes relevant. Even in that regard, however, such question as the existence of a right of termination is relevant only if the right is actually exercised and then only because it may affect gross income from mining which thus in turn affects the amount of depletion allowance. For, of course, the smaller the tonnage mined the lower the

4. Leaving aside the dispute between the Tax Court and the Court of Appeals for the Fourth Circuit as to the significance of reliance on sale.

income from mining and thus the smaller the deduction for depletion. But none of that has anything to do with the more fundamental question of the *existence* in the first instance of an economic interest, without which there is no right to depletion. It is only after that right has been established by virtue of finding that an economic interest exists, that it becomes relevant to look at amounts and computations, and even then only for the purpose of determining the amount of the depletion deduction—and that is not here in dispute. These quantitative considerations are of no greater moment here in relation to that basic question than such things as the cost and life of an asset or renewable feature of a lease are in relation to the existence of the *right* to (as opposed to the amount of) depreciation. Obviously, the lower the cost and the longer the life of an asset, the smaller the amount of the annual deduction for depreciation. But the *right* to any deduction at all exists even if the asset cost \$10.00 and has a life of ten years. So here: the cancellation of a contract or the reduction of the tonnage to be mined may reduce the amount of the income from mining and therefore necessarily the amount of the deduction for depletion. *But these quantitative considerations have no other relevance*⁵ They cannot affect the basic, initial question of whether there is an economic interest to start with.

The irrefutable soundness of this conclusion is demonstrated by the difficulties created by any effort to determine the point at which these limitations of quantity are effective to prevent the existence of an economic interest. In G. C. M. 26290, *supra*, the Commissioner decided that if a stripping contract cannot be terminated within a period of less than one year, then ordinarily the stripper has an eco-

5. Except in the extreme case where facts such as these, in combination with all the other facts in the case, require the finding of fact that the stripper is no more than an employee. In such event, the income from mining is the income of the employer; the employee simply receives compensation for services rendered. Cf. *Hughes*, 14 T. C. M. 172 (1955).

economic interest because he has enough time to mine "*a substantial* portion of the mineral deposit" (italics added). What is "substantial"? Suppose the property involved is sufficiently large as to require fifteen years to complete its stripping and that unusual amounts of overburden make it clear that disproportionately small amounts of coal will be mined in the first several years? Is less than 1/15 of the coal involved "substantial"? Furthermore and of more fundamental importance, is it not entirely consistent with the whole history and purpose of percentage depletion—and in fact do not that history and purpose require the conclusion—that the stripper acquires an economic interest upon the signing of such a contract, that the only significance of cancellation and the like is in relation to the monetary tax result which flows from the existence of that interest in the form of the deduction for depletion.

Continuing with the GCM, it provides that where the stripping contract is terminated on less than one year's notice, then all the facts must be considered in determining whether that power to terminate prevents the creation of the economic interest in the first instance. Among the facts listed are the size of the deposit and the estimated time required for its extraction. Thus, if cancellation requires notice of one year and a day, the presumption is that the stripper has an economic interest; but if notice need be for only 364 days, then it depends on whether the stripper has enough time to qualify his rights as an economic interest. In other words, whereas in the latter case, the presumption might be that 1/15 is not substantial, the reverse is true in the former case; yet in each case both strippers perform exactly the same function in the same maner under the identical contract giving them identical rights and obligations, the only difference being two days in the notice period. There is no sound basis for this distinction insofar as the fundamental issue of the existence of an economic interest is concerned. We submit that that issue is not affected by the limits on the amount of coal to be mined.

CONCLUSION.

We contend that a strip miner with the right by contract to mine coal from particular property, assuming the risks inherent in mining in relying upon the discovery and extraction of coal from the mine as the source of his income, is engaged in the precise mining activity which Congress intended to encourage by the percentage allowance. We contend that that strip miner is assuming the very risk for which depletion allowance was created as a reward, the risks which establish that he has an economic interest in the coal in place, as the various courts have defined that term. We contend that no other factor is relevant in connection with that fundamental issue; that risks involved in selling coal and in being limited in the amount to be mined, whether directly in the form of tonnage restriction, or indirectly in the form of cancellation on short notice, are completely without significance.

The strip-mining companies are an important segment of the coal mining industry and such companies assume all the risks inherent in removing near-surface coal. As Respondent stated in G. C. M. 26290:

“In the mountainous coal fields of the East there are few large areas which can be mined by removing the overburden, and the owner or lessee of the property does not ordinarily buy the necessary stripping equipment. Accordingly, in the case of small tracts of coal land from which the mineral cannot be economically removed by underground mining, as well as in situations in which a fringe of coal near the surface cannot be satisfactorily extracted by underground methods, the contractor who owns stripping equipment has solved a problem of the industry.”

The Tax Court erred, therefore, in the instant case in denying depletion to the strip miner who devoted his equipment, time and money to digging for the coal, who incurred all the risks inherent in strip-mining, and who is the one

on whom users of coal must depend to get the near-surface coal above the ground. The Tax Court erred, therefore, in refusing to follow the decision of the Court of Appeals for the Fourth Circuit in *Commissioner v. Gregory Run Coal Co.*, *supra*, that reliance upon sale of that coal has nothing to do with the question. The Tax Court erred, therefore, in adding still another irrelevant fact, namely, limits on the amount of coal to be produced.

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March 31, 1955



IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT.

No. 14,559.

EMIL USIBELLI and ROSE P. USIBELLI,
Petitioners,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition to Review the Decision of the Tax Court of the
United States.

Brief for Amici Curiae.

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anthracite operators. For reasons which are discussed below, many of these anthracite operators hire stripping contractors to load and haul coal to the operators' breakers. Such contracting is also widespread in the bituminous industry, although the contracts used there are not uniformly comparable to the anthracite stripping contracts. Beginning a few years ago, the Commissioner of Internal Revenue took the position that the deduction for percentage depletion allowable to the operators should be reduced by excluding from their "gross income from mining" upon which it was based the amounts paid to their stripping contractors. The Commissioner has not contended, so far as we are aware, that amounts paid to the operators' *employees* should be excluded from the operators' mining income. The Commissioner's position is apparently based on the theory that the contractors (but not the operators' employees) are entitled to a deduction for percentage depletion, but the Commissioner has also (as in the case at bar) denied a deduction for percentage depletion to the contractors. A question of widespread importance has thus arisen, affecting taxpayers throughout the industry. The amount of tax involved to the Jeddo-Highland Coal Company alone, for the tax years for which this question is now in controversy, is over \$100,000.

While there have been a number of opinions by the Tax Court in this general area, the only opinion of an appellate court so far was handed down by the Court of Appeals for the Fourth Circuit in the *Gregory* case, discussed at page 32 below. The case at bar is thus the second in this general area to be considered by an appellate court. While the taxpayer here was not a stripping contractor for an anthracite operator, we believe that the case at bar may have a decided bearing on the development of the law in the cases affecting our industry.

In the anthracite cases, we are contending, on behalf of the operators, that in view of the clear language of the statute, the Congressional intent as shown by the legislative

history, and the principles laid down by the decided cases, no deduction for depletion is allowable to the stripping contractors, because they have no depletable interest in the coal, nor any right to any coal in kind as their own, but are merely an adjunct to the *operator's* mining enterprise; and accordingly we contend that the compensation paid to the stripping contractors by the operator should not be excluded from the operator's gross income in computing the amount of the percentage depletion deduction allowable to the operator. In the case at bar, we accordingly support the Commissioner's position and contend that the contractor is not entitled to a deduction for percentage depletion.

Typical Stripping Contracts.

It is because of the analogy between the incidents of the taxpayer's contract in the case at bar and the incidents of the typical anthracite stripping contract that we believe this case may have a decided bearing on the cases affecting our industry. We therefore summarize the incidents of the typical anthracite stripping contract.

Title to the coal. The operator typically owns some deposits in fee and as to others is lessee to exhaustion of the coal, thereby, in Pennsylvania at any rate, acquiring exclusive title to all of the coal in place. *Smith v. Glen Alden Coal Co.* (1943), 347 Pa. 290, 298. The stripping contracts do not provide for the purchase or sale of any coal or other property. They do not contain any words of grant or of conveyance. The contractors get no title of any kind to any coal, do not buy or sell any coal or any interest in coal, and have no right to receive any coal in kind.

Scope of Work. The contractors agree to remove the dirt and rock (commonly known as "overburden") lying above the operator's coal, to load the operator's coal into trucks and to haul the operator's coal to the operator's nearby breaker. On tonnage so hauled to the operator's breaker, the contractors have completed their services and

are thereupon entitled to be paid their compensation by the operator.

After the coal reaches the operator's breaker, the operator processes its coal and delivers the coal to a carrier for shipment to market. The coal is then sold by the operator to the operator's customers, who pay the operator for it. There is no contract or any other relationship whatever between the stripping contractors and the customers. The contractors do not even know, and have no right to know, who buys the operator's coal or how much they pay for it, or whether it is sold at all.

Method of Compensation. The operator pays the stripping contractors for their services rendered at a fixed dollar amount for each ton of the operator's coal uncovered, loaded, and hauled by the contractors to the operator's breaker. Sometimes the rate of compensation per ton of coal fluctuates with the amount of overburden to be removed, and sometimes by reference to changes in certain defined costs of the contractor, but never in the typical case by reference to the market price of the operator's coal.

The sole source of the stripping contractors' compensation is the contractual obligation of the operator (and not of the operator's customers) to pay them for services rendered.

Risk of Market. Because the stripping contractor is typically paid for his services at a fixed rate per ton of coal hauled to the operator's breaker, he is not exposed to a decline in the market price. So long as he strips and hauls the operator's coal as required by his contracts, he has the operator's personal guarantee of payment, even though the operator sells its coal at a loss, or sells its coal and cannot collect, or even does not sell its coal at all.

Discovery. The stripping contractors do not discover the coal and are not hired to do so. In the typical case the extent and quality of the coal to be stripped, and the amount and type of overburden lying over it, have been previously

explored and fully ascertained by the operator, on whom the expense and difficulty of prospecting falls. When the stripping contractor bids on a stripping job, he is furnished with full information as to the borings and other explorations previously conducted by the operator.

Preparatory Work. The stripper must remove overburden before he reaches coal. He sometimes must build temporary roads from the deposit to the breaker. The cost of this work is naturally deducted from the strippers' taxable income, either as it is incurred or on the completed contract basis.

Equipment. The stripping contractor usually furnishes his own equipment, the cost of which is recoverable through depreciation. All of this equipment is movable and not specialized. If not used to strip for one operator, it can be taken to another operator's deposit. The moving may involve expense, but the expense is deductible. The equipment is not even limited to the coal industry. If the operator decides to discontinue a stripping operation, the stripper may contract, for example, to use his equipment in building a highway for the state, or on an excavating job in the construction industry.

Mining Risk. The stripping contractors do not bear the real mining risks. Before they bid on a stripping job, they have the benefit of the operator's full exploration of the deposit. If, despite this exploration, the ratio of coal to overburden should be uncertain, they may contract to be paid at varying rates per ton of coal depending on the varying ratios of coal to overburden which they actually experience. By prudent management they can ordinarily keep their removal of overburden carefully in step with, and not appreciably in advance of, their removal of coal, so that upon finding any unexpected fault in the coal, they can immediately stop any preliminary work on the adjoining section. The stripper is also not exposed to other typical mining hazards. If the stripper is temporarily idle, he

has no heavy maintenance costs; if the idleness should be prolonged, perhaps because of a fault in the deposit, the stripper's equipment, being entirely mobile, and adaptable to many other uses, can be put to productive use elsewhere for others. Consider the very different position of the operator, whose whole enterprise is wholly dependent on an uninterrupted supply of coal, of uniform quality, readily accessible to his immovable plant. Is it reasonable to believe that the contractors, if bearing any serious mining risk, would contract to dig and haul coal for a fixed price per ton?

Termination. Some stripping contracts are terminable by the operator on short notice. Others contemplate that the stripper will work for a year or more and that during that time no other contractor will be permitted by the operator to strip the deposit in question. But the operator customarily retains the right to stop the stripper's work indefinitely. This necessity may arise, of course, from market conditions—if the demand falls off for the operator's coal, the operator cannot keep the stripper working and stockpile coal indefinitely. But other reasons for stopping the stripper may arise, and in a manner showing that it is the operator's mining enterprise in which the stripper's work is but a part—for example, the operator's breaker may have to shut down for repairs, or the underground coal with which the operator mixes the stripped coal may not be available. When it comes to the crucial questions of the quality and quantity of coal to be taken, the operator is typically in command, because in the last analysis it is the *operator's* mining venture in which the stripper is engaged.

Reasons for Contracting. The typical operator has on his lands a variety of deposits. In addition to those far underground he has deposits near the surface, but at varying depths and lying under different types of overburden. Many operators find it uneconomic to keep on hand the dif-

ferent types of equipment necessary for all these different types of surface operations. The contractors, with a variety of movable equipment, adapted to all sorts of different earth- and rock-moving work, can furnish one type of equipment for one stripping job, move to another when that one is completed, or furnish another type of equipment for another type of job. There are operators of course whose deposits are sufficiently uniform so that it is prudent for them to conduct stripping operations with their own equipment and employees. The Commissioner has not suggested that such employees are entitled to depletion, or that the amounts paid to them are to be excluded from the operator's gross income. Why should operators who hire stripping contractors be treated in any different way from operators who strip with their own employees? Neither the contractor nor the employees have any property interest which is being depleted. The depletion is sustained by the *operator* in the extraction of the *operator's* coal, in the course of the *operator's* mining business, and *is sustained by the operator to exactly the same extent regardless of whom the operator engages to do the stripping.*

In summary, in the typical case, the stripping contractors are mere hirelings, engaged to carry out but one of the many parts of the *operator's business* of converting the operator's coal in the ground into a marketable product.

ARGUMENT.

After discussing the applicable statute and the legislative history of the depletion allowance, we propose to show how the principles laid down by the leading cases in the United States Supreme Court and by the Commissioner's Regulations have been applied in the cases in the oil industry which are analogous to the case at bar, and in the cases so far decided by the Tax Court regarding the allowance of depletion to stripping contractors. We contend that the law as developed by the Tax Court has been entirely consistent, both with the Congressional intent, as shown by the legislative history, and with the principles laid down by the leading cases and by the Commissioner's Regulations.

The Statute.

The cases already decided and now pending in the courts on this question all arose under the Internal Revenue Code of 1939. That Code allows a deduction for percentage depletion, based on the "gross income from the property", which is defined in Section 114(b)(4)(B) as the "gross income from mining". In the ordinary case, of course, it is the owner and operator of the mine who admittedly derives the gross income from mining, and the question is whether he must share any of the resulting deduction with any of the contractors who perform services for him.

The statute does make provision for dividing the depletion among two or more parties interested in the same property. Section 23(m) of the 1939 Code deals expressly with three distinct situations:

(a) "in the case of leases, the deduction shall be equitably apportioned between the lessor and lessee";

(b) where property is "held by one person for life with remainder to another, . . . the deduction . . . shall be allowed to the life tenant"; and

(c) where property is held in trust, the deduction is to be “apportioned between the income beneficiaries and the trustee” in accordance with the trust instrument, or, if it is silent, then “on the basis of the trust income allocable to each”.

The case at bar, however, does not involve a lease to the contractor, a life tenancy, or a trust. It is perfectly clear that while Congress did expressly consider the possibility of a division of the allowable deduction, the statute definitely does not authorize such a division where the owner of the deposit hires an independent contractor to dig, haul, and load the owner’s coal. The intention of Congress not to allow a deduction for percentage depletion to independent contractors who merely perform a service in respect to another’s coal is shown by an amendment adopted in 1950, stated by the Senate Finance Committee to be declaratory of pre-existing law (1950-2 C.B. p. 522). Pursuant to this amendment, if the ordinary treatment processes are carried on at a distance from the mine, not exceeding 50 miles in the ordinary case, Section 114(b)(4)(B) as so amended provides that the term “mining” is to include the “transportation of ores or minerals (*whether or not by common carrier*) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied” (emphasis supplied). Apparently 50 miles was considered the normal maximum distance from the deposit to such plants. The significant feature of this amendment for the present case, in addition to the Committee’s statement that it is merely declaratory, is the fact that even though one of the portions of the entire process of obtaining marketable coal is performed by an independent contractor—in the case of transportation, by a common carrier—nevertheless it is the intention and express direction of Congress that the amounts paid to that contractor are not to be excluded from the gross income upon which the *operator’s* percentage depletion is to be computed, and conse-

quently that the contractor should not be entitled to any deduction for percentage depletion.

The Legislative History.

A brief review of the legislative history will show that percentage depletion was the natural outgrowth of the earlier methods of computing depletion, and was intended as a more practical and equitable substitute for them, to accomplish the same results, for the same taxpayers, as those to whom the earlier types of depletion were allowable.

The early Revenue Acts allowed the *cost* of the coal in place to be recovered over the expected life of the mine, and where the mine had been acquired before 1913, allowed the *value on March 1, 1913* to be so recovered. But as the true extent and quality of a mineral deposit are often hidden until they are explored, and as one of the objects of the depletion allowance has been to encourage prospecting, especially in war time, the Revenue Act of 1918 permitted depletion to be deducted by reference to the value of the property "at the date of *discovery*". The purpose was thus stated by Secretary of the Treasury Snyder (Hearings, Ways and Means Committee, Revenue Revision of 1950, p. 51):

"Allowances in excess of cost depletion were first granted in the form of discovery depletion in 1918 as a measure to stimulate mineral exploration for war purposes and to lessen tax burdens on small-scale prospectors who made discoveries after years of fruitless search. Discovery depletion deductions allowed the discoverer of any new mineral deposit to retrieve not only his costs but also the materially larger appreciated value of the property at the time its profitability was established."

The application of these methods of computing depletion led in practice, however, to serious inequities and ad-

ministrative problems, arising principally out of the difficulty of arriving at a fair present value of a mineral deposit, which depended in turn on many assumptions as to the size and quality of the deposit, and the demand for the mineral, rate of profit in mining it, and the fair return on risk capital over the many future years of the operation of the deposit. As early as 1919 certain officials in the Bureau of Internal Revenue became interested in percentage depletion, which had already been adopted in Canada. They proposed to determine the *average percentage* of the gross or net income from each type of mineral deposit which was in fact being allowed under the methods then in use, and to allow depletion to all taxpayers extracting each type of mineral at the average percentage so determined for that particular mineral. In addition to treating all taxpayers alike who mine the same mineral, this proposal had the great merit that it was keyed to the actual results of exploiting the deposit over the years, instead of depending on the many assumptions as to the size and quality of the deposit and its future earning power involved in the other methods. And yet—and this is the significant feature of the proposal from the viewpoint of the case at bar—percentage depletion was intended as a vastly simpler procedure for producing the same results and for the same reasons as the methods previously in use. As Chief Justice Hughes stated, in *Helvering v. Bankline Oil Co.*, (1938) 303 U. S. 362, at p. 367: “The granting of an arbitrary deduction in the case of oil and gas wells, of a percentage of gross income was in the interest of convenience and in no way altered the fundamental theory of the allowance.”

Percentage depletion was first applied by Congress in the Revenue Act of 1926, to oil and gas wells. After the submission to the Joint Committee on Internal Revenue Taxation of a thorough report on the subject by L. H. Parker, in September 1929 (see Reports to the Joint Committee, Volume I, part 8), percentage depletion was ex-

tended to metal mines, including coal, by the Revenue Act of 1932.

In the years since 1932, the Congressional Committees have several times reviewed the methods of computing allowable depletion, but after taking testimony from those most familiar with their operation, have made no change in the basic principles governing percentage depletion.

The testimony¹ has referred, first, to the highly speculative character of most mining ventures, the difficulty and expense of finding the deposits, and the loss of investment in many supposed deposits for each that turns out profitably. In addition the fact that mineral resources are ordinarily underground introduces special hazards into mining operations, from floods, cave-ins, and other consequences of the difficulty of controlling conditions beneath the surface. These conditions also increase the cost of maintaining an idle mine during slack periods. The fixed location of the deposits means that the mining concern cannot choose the most favorable site for its operation, having regard to freight rates, accessibility to markets and labor supply, and other cost factors, but must go where the deposit is, whatever the cost. The raw materials used by a mining concern, unlike those of a factory, are usually acquired many years before they are processed, and the capital invested in them is thus tied up for long periods. Further, the experience of coal operations over the years has been one of feast and famine, of wide fluctuations both in the quality and in the quantity of marketable coal.

1. See, for example, Hearings, Ways and Means Committee, Revenue Revision of 1942, Statements of D. A. Callahan, pp. 1168-1186; R. D. Campbell, pp. 1188-1194; Evan Just, pp. 1203-1206; J. D. Battle, pp. 1210-1213; Hearings, Finance Committee, Revenue Revision of 1942, Statements of D. A. Callahan, pp. 1389-1399; R. D. Campbell, pp. 1399-1405; Hearings, Ways and Means Committee, Revenue Revision of 1950, Statements of D. A. Callahan, pp. 348-362; National Minerals Advisory Council appointed by the Secretary of the Interior, pp. 364-371; Taxation Committee of National Bituminous Coal Advisory Council, pp. 388-407; R. D. Campbell, pp. 407-413; J. W. Haley, pp. 464-469; R. Y. Moffat, pp. 470-471.

The question now arises: is it consistent with the foregoing history for a contractor such as the taxpayer in the case at bar to be entitled to percentage depletion? Are the incidents of this contractor's operations truly comparable to those upon which percentage depletion was originally based and upon which it has subsequently been maintained in the law?

The method based on March 1, 1913 value is obviously inapplicable. So far as the cost method is concerned, it is clear that if the contractor had paid anything for some interest in the coal, he would have a cost which, upon allocation to the recoverable tonnage, would be allowed as depletion. But the Tax Court has made no finding that the contractor here paid anything for any interest in any coal; indeed, it is clear that, like the typical stripping contractor, he did not acquire any interest in any coal whatever.

Would the contractor be entitled to depletion on the basis of discovery depletion? The Tax Court has made no finding in the case at bar that the contractor here did any prospecting; and in the typical anthracite case, the stripping contractor would clearly not be entitled to discovery depletion, by reason of the significant circumstance that he does not discover the coal. The value of the deposit on discovery is not his concern, as it is not his deposit, he being engaged only to uncover it and haul it to the processing plant. The reasons which led Congress to enact discovery depletion—the desire to encourage prospecting, the desire to measure return of capital from the value of the taxpayer's deposit as determined upon *that taxpayer's* discovery of the deposit—these reasons would be wholly inapplicable to the stripping contractor.

Are the reasons upon which Congress has relied in extending percentage depletion to the coal industry applicable to the contractor here? This contractor, unlike the typical operator, is not at the mercy of the market, as the coal here is never to be sold. Can the contractor here, like the stripping contractor, move to another location if

the coal turns out to be faulty? Can the contractor here, like the stripping contractor, leave the coal industry altogether and do road building for the highway department or excavating for a builder? If so, the aspects of the mining business presented to Congress as grounds for continuing the percentage depletion deduction would be inapplicable to the contractor here.

What then would be the result of allowing a deduction for percentage depletion to a contractor such as the one at bar? It would extend the deduction, without any statutory authority, to taxpayers, like this contractor, who could not possibly have claimed it under the previous provisions for which percentage depletion was merely a substitute. It would lead to excluding the payments by the operator to his stripping contractor from the gross income on which the operator's depletion is computed. It would read into the statute a provision for such exclusion, when no such provision exists. It would lead to treating operators who strip with their own employees and equipment in an entirely different way from those who hire stripping contractors, without any statutory authority or sensible reason for such an arbitrary distinction.

Such a construction would stretch the statute not only beyond its clear provisions, but also beyond its established purpose.

The Leading Cases Emphasize That Depletion Is Allowable to One Who Has an INTEREST in the Mineral IN KIND, and Not to One Who Derives a Mere Economic Advantage from Production.

An analysis of the leading decisions of the United States Supreme Court dealing with the division of depletion between several taxpayers interested in the same mineral deposit will show that the rights of the participants in such properties to whom depletion has been allowed by the Court were materially different from the rights of the typical

stripping contractor, and, we submit, from the rights of the taxpayer in the case at bar, as found by the Tax Court.

In *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364 (1925), in holding that a lessee of an iron mine who subleased it to another was nevertheless entitled to depletion, the Court stressed the substantial rights in the ore in place granted by the lease to the taxpayer, including "the valuable right of removing and reducing the ore to ownership".

In *Palmer v. Bender*, 287 U. S. 551 (1933), where the Court first stated the "economic interest" principle, the taxpayer, as lessee of oil land, assigned to another the right to extract and sell the oil, reserving the right to future payments of agreed fractions of the oil produced, payable *in kind*. The Court allowed depletion to the taxpayer, saying, at p. 557:

"It is enough if by virtue of the leasing transaction *he has retained a right to share in the oil produced*. If so, he has an economic interest in the oil in place, which is depleted by production." (Emphasis supplied.)

In the first Supreme Court case applying these principles to percentage depletion, *Helvering v. Twin Bell Oil Syndicate*, 293 U. S. 312 (1934), the depletion was similarly divided between those who shared the production *in kind*.

On the other hand, in *Helvering v. Elbe Oil Land Development Co.*, 303 U. S. 372 (1938), where the taxpayer assigned his lease for cash and a share in the net profits to be obtained by the assignee from production, the Court held that no interest in the oil in place had been retained, and the taxpayer was accordingly not entitled to depletion.

And in *Helvering v. O'Donnell*, 303 U. S. 370 (1938), rehearing denied, 303 U. S. 669 (1938), the taxpayer assigned to another his stock in a corporation owning oil and gas properties, in consideration of the assignee's agreement to pay one-third of the *net profits* from operations. The taxpayer was denied any deduction for depletion, as his ownership of stock did not constitute an interest in the oil

and gas in place, and the personal covenant of the assignee carried with it no interest in the properties or their output. The taxpayer obtained an "economic advantage from the (assignee's) operations," the Court said, "but that advantage or profit did not constitute a depletable interest in the oil and gas in place."

The retention of an interest in the net profits does not bar the deduction, however, where the taxpayer also retains other *substantial* interests in the mining deposits. For example, in *Kirby Petroleum Co. v. Commissioner*, 326 U. S. 599 (1946), the taxpayer leased oil land for an oil royalty payable in kind and a share in the lessee's net profits. It was held that, in the light of the substantial economic interest reserved by the taxpayer in the oil in place by virtue of the royalty *payable in kind*, there was a sufficient economic interest also in the oil to support percentage depletion to the taxpayer on the share in the net profits received.

And in *Burton-Sutton Oil Co. Inc. v. Commissioner*, 328 U. S. 25 (1946), the taxpayer operated certain oil lands as the ultimate assignee of a series of assignments of the basic lease. The taxpayer was required to pay to one of the previous assignors one-half of the taxpayer's net income from operations. It was held that although the assignor-payee had never been the owner and was merely an assignee in the chain of assignments, and although the assignor-payee received only a share of the net income, nevertheless the additional substantial rights retained by the assignor-payee showed that he had reserved an "economic interest" in the oil, so that payments to him by the taxpayer were not only to be excluded from the taxpayer's taxable income, but also from the taxpayer's "gross income from the property", for purposes of computing the percentage depletion to which the taxpayer as producer was admittedly entitled. Cf. the Tax Court's opinion on remand, 7 T. C. 1156. The valuable rights so retained and so distinguishing the situation from that in the *Elbe Oil Land* case were the right to require prompt drilling, the right to require an accounting of production, and the *right to buy all the oil produced on*

specified terms if desired. These rights, however, are far more extensive and give a far greater interest in the economic potential of the mineral deposit than the closely restricted rights of the contractors, such as the taxpayer in the case at bar, who have no right to insist that any particular quantity of coal be produced, promptly or otherwise; who have a right only to be paid the agreed rate on the tonnage of the owner's coal which they turn over to the owner; and who have no right to buy any of the coal produced.

In *Helvering v. Bankline Oil Company*, 303 U. S. 362 (1938), the Court denied percentage depletion to a processor of oil products, despite his control over their sale. There the taxpayer operated a plant for the extraction of gasoline from wet natural gas. The raw gas was supplied to the plant from wells controlled by a number of separate operators. The taxpayer took title to the gas at the mouth of each well and paid for the right to process the raw gas by handing over to the producer one-third of the gasoline and by-products derived from the taxpayer's process. It was held that the taxpayer in that case was not entitled to percentage depletion, because, although he derived an economic advantage from the production, he had no capital investment in the gas *in place*. He had a right to receive any gas produced, but he could not compel its production. Chief Justice Hughes put the principle in a nutshell when he said, at p. 367:

“The phrase ‘economic *interest*’ is not to be taken as embracing a mere economic *advantage* derived from production, through a contractual relation to the owner, by one who has no capital investment in the mineral deposit.” (Emphasis supplied.)

Similarly the stripping contractors perform merely one of the steps in the total operation of extracting and processing the operator's coal into a marketable product, and, although deriving an economic *advantage* from performing their

portion of the work, have no capital investment in the coal in place. They have no right to compel continuance, even in their part of the process, if the operator chooses at any time not to take its coal in at its breaker. They have at most, as did the taxpayer in the *Bankline* case, the right to insist that if anybody is to perform their particular part of the total processing of the material, they are to be the ones to do it. And unlike the processor in the *Bankline* case, the strippers have no right to keep and sell for their own account any part whatever of the natural resource itself. Similarly the taxpayer in the case at bar, while possibly processing the coal farther than the typical anthracite stripper, had no capital investment in the coal in place, which remained at all times the property of the Government, and had no right to keep and sell for his own account any part whatever of the coal.

The Commissioner's Regulations.

The principles developed in these cases have been echoed in the section of the Commissioner's Regulations which is most nearly relevant to the present issue:

Regulations 111, Section 29.23(m)-1:

"The owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. * * * An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any *interest in mineral in place* or standing timber and secures, by any form of legal relationship, income derived from the *severance and sale* of the mineral or timber, to which he must look for a return of his capital. *But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production.* Thus, an agreement between the owner of an economic inter-

est and another entitling the latter to purchase the product upon production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest. * * *'' (Emphasis supplied.)

How do these principles apply to the stripping contractors? They have not invested any capital in the deposit, their investment being in depreciable equipment. They are hired to sever the operator's coal (among other services to be rendered by them), but they have nothing to do with its sale, nor is their return dependent on the operator's sale of the coal. If the operator should choose to stockpile coal against a period of better demand, the stripper would continue to be paid for his services even though no coal was being sold at all. The fact is that the stripper's capital is returned to him through the use (and therefore depreciation) of his equipment. Such use takes place fully as much in the removal of overburden and the hauling of coal as it does in the severance of coal, and is quite independent of any sale of the coal. The stripper does not have the right to "reduce the ore to ownership," which was the basis of *Lynch v. Alworth-Stephens*, nor the right to receive any coal in kind, comparable to the oil interests payable in kind which were central to the decisions in *Palmer v. Bender*, *Twin Bell*, *Kirby*, and *Burton-Sutton*.

The stripper relies, not on any interest in the coal, whether in place or on the market, but on the personal covenant of the operator, who promises to pay him compensation for services rendered. Is not the stripper's situation far more analogous to that of *O'Donnell*, who relied merely on a personal covenant, or to *Bankline*, who, like the stripper, had a "mere economic advantage from production, through a contractual relation to the owner"?

How do these principles apply to the taxpayer in the case at bar? His capital has been invested, not in the coal deposit, but in his depreciable equipment. His capital is

returned to him through the depreciation of his equipment, which occurs not only in the severance of the Government's coal, but also in hauling, processing, and loading it for shipment. He does not have the right to "reduce the ore to ownership", nor the right to receive any coal in kind. He relies for his compensation, not on any interest in the coal, whether in place or on the market, but on his contract with the Government to pay him for services rendered.

To reduce the operator's depletion deduction by excluding from the operator's gross income the amounts paid to the strippers, and to allow the depletion deduction pro tanto to the strippers, or to the contractor in the case at bar, would be to distort beyond recognition the guiding principles developed in the leading cases, and adopted in the Commissioner's Regulations.

Decisions Regarding Independent Contractors in the Oil Industry Have Allowed Depletion Where the "Contractor" Has an Interest in Kind in the Oil, But Not Where He Has a Mere Economic Advantage from Production.

The closest analogy in the oil industry is presented by the cases dealing with the allowance of depletion to taxpayers who own and operate the specialized equipment required for drilling oil wells. Such drillers are ordinarily paid in cash for their services, and ordinarily do not receive any share in the oil itself, and no suggestion appears to have been made in any of the decisions that such a driller receiving cash alone is entitled to depletion. But in the unproven areas, the driller is often paid only a part of his compensation in cash, and in many cases the balance of his compensation is to be paid to him solely out of the oil produced, if any. The driller has substantially completed his work before the productivity of the well is known and thus makes a substantial investment in what is essentially a quite hazardous undertaking, considering that in 1951, for example, according to the American Petroleum Insti-

tute, approximately 16,000 dry holes were drilled in the United States, and that in the unproven areas, to which contracts compensating drillers from a share in the oil are usually confined, the dry holes comprised approximately seven-eighths of all the wells drilled. The anthracite stripper on the other hand frequently starts extracting coal at almost the beginning of his work, and the extent of the coal deposit has been fully ascertained ahead of time by the operator. There are rarely any "dry holes" in coal stripping. There is likewise no finding by the Tax Court in the case at bar that there was any uncertainty as to the extent or quality of the coal deposit here. Furthermore, the anthracite stripper, and the taxpayer in the case at bar, in receiving compensation at a fixed amount per ton regardless of the market price, are in an entirely different position from the driller who derives a substantial part of his compensation from his *share in the oil* produced, with its attendant risks and benefits from changes in the market price. In the light of the leading Supreme Court cases referred to above, upon which the drillers' cases expressly rely, the crucial significance of this method of compensation is evident.

The leading case dealing with such drilling contracts is *Dearing v. Commissioner*, 102 F. 2d 91 (C. A. 5th 1939). There it was held, following *Palmer v. Bender, supra*, that as the driller had not deducted his drilling costs as business expenses in the year of drilling, but had capitalized them to the extent not reimbursed by the small cash payment on completion of the drilling, and as he was to be further compensated, not under any personal obligation of the operator, but from the interest in the oil *in kind* reserved by the driller, he had thereby obtained an economic interest in the oil in place. Accordingly, the share received by him from the sale of oil during the taxable year was subject to percentage depletion. But the contractor *is* compensated by virtue of the owner's personal obligation, and *not* from any share in the coal reserved to the contractor. Further,

the basic difference in the factual situation was highlighted here by the fact that the driller was still receiving his compensation on his lucky strike in this case *several years* after his services were *completed*—a situation which would be unthinkable in coal stripping operations or under the Government contract in the case at bar.

Similarly in *Spalding v. U. S.*, 97 F. 2d 697 (C. A. 9th 1938), *cert. denied* 305 U. S. 644 (1938), the taxpayer, as lessee, engaged an oil company to *drill and operate* the wells for *fifteen years* and turn over the oil to the taxpayer for sale, the oil company however to receive about 60% of the proceeds of such sale. It was held that both the taxpayer and the oil company had depletable economic interests in the wells, and that the taxpayer could deduct depletion by reference to only one-third of the gross income from the wells, that being her share of the oil in kind. The Court dismissed the argument that the oil company did not have a depletable interest as follows (97 F. 2d, at p. 700) :

“Though referred to in the agreement as a ‘contractor,’ the Oil Company was not, as contended by appellant, a mere contractor for hire. It had the right to, and did, occupy the leased property and produce oil and gas therefrom. It had the right to, and did, receive and retain as its own 61⅔% of the net proceeds of the oil and gas so produced. These were continuing rights which, except for non-performance of the agreement by the Oil Company, were not terminable by appellant until 1944. The possessor of such rights cannot be regarded as a mere hireling.”

By this test, however, the anthracite stripping contractors would clearly be mere “hirelings.” They have no exclusive possession of the property, but are merely permitted to come on it to perform their services. They do not produce a saleable product, but merely haul the operator’s raw coal material to the operator’s breaker for processing. They have no right to, and do not, retain as their own any share whatever of the coal or of the proceeds of its sale by the

operator. They are engaged to perform a specific, limited service, without any rights whatever in the coal itself, and as such they are mere contractors for hire. Similarly the taxpayer in the case at bar was engaged to perform a specific service, with no right to retain any coal for himself, and as such is merely a contractor for hire.

These principles were recently further illustrated in the opinion of Judge Disney in *Roeser & Pendleton, Inc.*, 15 T. C. 966 (1950), aff'd. sub nom. *M-B-K Drilling Co. v. Commissioner* (C. A. 10th 1952), 194 F. 2d 221. There a driller contracted to drill certain wells "at the prevailing rate in the field . . . for similar work performed by independent contractors." As each well was finished, the driller was to be paid his cash outlay on that well, and the balance of his compensation was to be paid in monthly instalments, "each such payment to be . . . not less than fifty percent of the operator's net income" from the well, the payments to begin after the well "had fully paid out." Judge Disney construed this to mean that the driller was to be paid for his services in all events. His opinion states, at p. 971:

"It is not reasonable to believe that the petitioner would have drilled for the usual rate prevailing in the field and at the same time have taken a chance on oil production for its payment. We have no doubt that had there been intent to take such a chance, the drilling price would have been more than the usual rate. Though there were to be monthly payments deferred until the 'payout' of the properties of the operator, there was provision for continuation of payments until the 'account payable' was 'fully discharged,' from which we believe that the principal thought involved was the deferment of liability until the operator's other costs were fully paid out and that in the absence of any provision that payment should be limited to the oil or proceeds, M-B-K would have had a right to a

reasonable monthly payment even after oil production had ceased until the account was paid up.”

The Tax Court therefore held that, as the driller’s compensation was based on the personal obligation of the operator, and not on any interest in the oil in place, the driller did not acquire an “economic interest” in the oil and therefore would not have been entitled to a deduction for depletion. It will be noticed that this driller, like the stripping contractor, was held to have assumed none of the risks assumed by the wild-cat driller in consideration of an in-oil payment. The contractual relationship in the *Roeser & Pendleton* case was aptly summarized as follows, at p. 973:

“[The operator] could have paid [the driller] out of any funds available to [the operator], and the monthly payments while there was oil production would be merely measured thereby.”

Like the driller in *Roeser & Pendleton*, the anthracite strippers are contractors for hire, engaged to render specified services for the operator, in uncovering, loading, and hauling the operator’s coal to the operator’s breaker, but without themselves having any rights in that coal. The operator is personally obligated to pay for these services, regardless of whether that coal is or is not further processed and sold. The operator must pay for these services out of any funds available to the operator. The fact that the payments are measured by the quantity of the operator’s coal hauled to the breaker is no more controlling than it was in *Roeser & Pendleton*. Similarly the taxpayer in the case at bar is engaged to extract, grade, and load the Government’s coal, without himself having any rights in that coal. The Government is obligated to pay for those services regardless of the disposition of the coal, and the fact that payments are measured by quantities of coal shipped is immaterial.

The driller in *Roeser & Pendleton* played an important part in the extractive process; he was the first to come in contact with the oil in place; he apparently completed the well, with the oil ready to flow; but, like the strippers and the taxpayer here, he looked for his compensation to the personal obligation of another, and not to the mineral itself; and for this reason, equally applicable to the strippers and to Usibelli, he had no "economic interest" in the mineral.

Cases Arising in the Mining Industry Have Consistently Held That, Under a Contract Such as the One Before This Court, the Contractor Does Not Have a Depletable Interest in the Coal.

Twelve cases have so far been decided by the Tax Court on the general question here in issue. None of the judges of the Tax Court has dissented in any of these cases. In deciding which contractors have a depletable interest in the coal and which do not, the Tax Court, in a manner fully consistent with the authorities cited above, has first taken into consideration all of the incidents of the contracts. Those contracts which give the contractor extensive rights and duties in connection with the mining of the coal, and under which he must assume risks of the market and otherwise, have been held to give the contractor an interest in the coal entitling him to a deduction for percentage depletion. But those contracts which limit the role of the contractor to uncovering, loading, and hauling coal, when and as coal is needed by the operator, which do not expose him to the risks of a fluctuating market price, and which make his compensation the personal obligation of the operator, have been consistently held not to give the contractor an interest entitling him to percentage depletion. We submit that these cases have been correctly decided, that the line drawn by the Tax Court is practical and consistent with the authorities, and that this Court should hesitate to dis-

turb a principle carefully thought out by the Tax Court and found to be workable in such a considerable number of cases.

The first of these decisions by the Tax Court was *Morrisdale Coal Mining Co. v. Commissioner* (Judge Rice, November 12, 1952) 19 T. C. 208; ~~on~~ *appeal* 2 C. A. 3d ~~1953~~. Although the taxpayer in that case was a bituminous operator, the incidents of the stripping contractors' relationship to the operator were substantially similar to those set forth above as typical in the anthracite industry. The contractors received a stated amount per ton of coal hauled by them to the operator's tipple, which sum was independent of the market, and the operator's obligation to pay arose when the coal was hauled to his tipple by the contractors regardless of whether or when the operator sold the coal. The contractors received no payment in coal and had no right to sell any coal to other parties. The amount of coal to be mined by them was entirely dependent upon the operator's demands. The Tax Court held that the contractors had no economic interest in the coal, and were not entitled to depletion, and that therefore the payments made to them by the operator should not be excluded from the operator's gross income in computing the operator's depletion.

It is important to note that the Tax Court, in determining whether the contractor had an "economic interest" in the coal, first looked—as it was required to do under the leading cases—to all the incidents of the contract, and on those incidents based its conclusion that the contractor did not have an "economic interest". The right of the operator, for example, to control the quantities of coal to be hauled by the contractor to the breaker is one of the factors indicating that the contractor was a mere hireling, performing a step in the operator's business at the operator's beck and call. It would be begging the question to say, as contended at pp. 11 ff. of the Amicus brief filed here for the stripping contractors, that the contract gave the con-

tractor an "economic interest" and that therefore the fact that the operator can control the quantity of coal hauled by the contractor is immaterial. The operator's control over the quantity of coal hauled is an essential feature of the contract, which must first be considered before it can be decided whether the contract does or does not confer an "economic interest" on the contractor.

In *James Ruston* (Judge Hill, November 21, 1952), 19 T. C. 284, *appeals by taxpayer and Commissioner to C. A. 4th dismissed without opinion on parties' stipulation*, 1953 P. H. Fed. Tax Service, para. 71,153, the Tax Court, again looking to all the incidents of the stripping contractor's rights and duties, found that the stripping contractor there not only supplied the necessary stripping equipment and built the necessary roads, but also maintained and operated the tipple, and processed, cleaned, and shipped the coal at its own expense. The Tax Court construed the contract as providing, not that the contractor was to be paid a fixed rate for coal shipped, but rather that the contractor was to be paid a percentage (83%) of the net selling price from coal sold, a vital distinction in the light of the authorities. It is important to realize that the sharing of sales realization was not relied upon as the *sole* test of who is entitled to depletion. In the light of the leading cases, *supra*, and of the Commissioner's Regulations, however, the deriving of income from the severance *and sale* of the mineral certainly is significant, and could hardly be more dramatically shown than by an agreement compensating the stripper by a direct percentage in the realization. The Tax Court also relied on another factor—very significant in the light of the *O'Donnell* and *Bankline* decisions—that the contractor looked for its compensation to the sales proceeds and not to the personal obligation of the taxpayer. Another significant factor in the *Ruston* case is the contractor's very considerable participation in the entire mining process—operating and maintaining the tipple, and sizing, cleaning, and shipping the coal. This participation was far more

than the typical anthracite contractor's role of merely uncovering, loading and hauling coal, which in the ordinary case is a mere portion of a complex prospecting, extracting, processing, and marketing business carried on and dominated by the operator. The stripping contractor in the *Ruston* case obviously had a stake in the coal itself, and the Tax Court accordingly held that the contractor in that case was entitled to percentage depletion.

While the Tax Court in the *Ruston* case thus relied on a variety of factors, it was the sharing by the contractor directly in the sales proceeds which was most frequently referred to. There are several reasons for the significance of this provision. A contractor who shares in the sales realization comes more clearly within the requirement of the leading cases, *supra*, and of the Commissioner's Regulations, that to have an "economic interest" one must derive income from the severance *and sale* of the mineral. It is hard to see how a contractor who is paid for hauling coal which may never be sold can derive income from its *sale*. Further, a contractor who shares in the sales proceeds takes the risk of the market, and his chance of profit is tied much more intimately to the rise and fall of prices and to the fluctuations of demand than would be the case if he depended solely upon the contractual obligation owed to him by the operator. Fundamentally, the significance of sharing in the sales proceeds derives from the circumstance that while a deduction can only be allowed to a taxpayer for the depletion of *his coal*, the question as to what is his coal must be decided, not so much by the niceties of legal title, nor by the question whether he is an employee or an independent contractor, but rather by the very practical economic tests of businessmen. We submit that the Tax Court has correctly held that where a contractor merely loads and hauls coal for a fixed sum guaranteed by the operator, who must pay whether the coal is sold or not, the contractor has only a limited business interest in the coal—indeed, he might as well be hauling rocks; but where

the contractor's profit depends directly on whether the coal is sold and if so, for how much, then he is clearly in the business of mining and selling *coal* for his own account and for that reason is sufficiently involved in an economic sense to be entitled to a part of the depletion deduction. Many of the cases cited in this brief (e.g. *Palmer*, *Twin Bell*, *Kirby*, and *Burton-Sutton*) speak of an interest in the natural resource *in kind* as an important test of the right to deduct depletion. We believe that a contractor who is paid by reference to a percentage of the sales price may thereby be said to have an interest in the coal *in kind* and that such a right to share in the proceeds of sale, far from being irrelevant, as contended at pp. 4 ff. of the Amicus brief filed here for the stripping contractors, is a significant indication of a depletable interest. This principle was thus stated in *Eastern Coal Corp. v. Yoke*, 67 F. S. 166, at p. 175:

"The courts have repeatedly held that rights to share in the gross proceeds derived from the sale of the mineral produced are analogous to rights to share in the mineral produced. It follows that one who has a right to a share of the proceeds from the sale of coal produced has ownership of a corresponding depletable economic interest without regard to conveyancing formalities."

The *Morrisdale* and *Ruston* cases, decided within a few days of each other, thus illustrate the circumstances under which a contractor is or is not entitled to depletion.

In the following cases the Tax Court found that the facts brought the situation within the *Morrisdale* case:

Mammoth Coal Company (Judge Le Mire, reviewed by the Court, June 16, 1954) 22 T. C. 571* The contractors looked only to the personal obligation of the operator and had no right to any coal in kind; their compensation did not vary with the market price; the operator could control the quantities of coal to be stripped by the contractors.

* on appeal to C A 3d

The agreements of some of the contractors, but not all, were terminable at will by the operator.

C. A. Hughes & Co. (Judge Withey, March 9, 1955) 14 T. C. M. 172, #20,893 (M); the stripper's contracts were found to be terminable by the operator on short notice.

Hamill Coal Corporation (Judge Withey, March 23, 1955) 14 T. C. M. 218, #20,924 (M). The contractor looked only to the operator for payment and had no right to any coal in kind; the contractor's compensation did not vary with the market price; the operator controlled the stripping operations and could reduce the quantity of coal to be stripped by the contractor; the contractor's investment in equipment was immaterial, as the equipment was movable and adaptable to other ventures.

Weirton Ice & Coal Supply Co. (Judge Bruce, June 10, 1955) 24 T. C. No. 40. The contractor was paid by reference to his costs and not by reference to any sales price; the contract could be terminated by either party on short notice; the contractor furnished all equipment and loaded, hauled, and processed the coal; the operator did not direct the manner of carrying out the operation; the contractor's investment in equipment was immaterial, as it was adaptable to other uses and subject to a deduction for depreciation. The fact that the contractor had other lands on which it mined coal for its own account was also immaterial. "The discretion and independence which is allowed an independent contractor in the performance of his services and the similarity between those services and the conduct of like operations on the contractor's own lands have no bearing upon whether the contractor has an economic interest in the coal which he is extracting for another" (emphasis ours).

In the three following cases the Tax Court found that the facts brought the situation within the *Ruston* case:

Helen C. Brown (Judge Murdock, April 13, 1954) 22 T. C. 61. The contractor had "the exclusive right to mine the coal . . . and was to be paid a percentage of the

amount of the gross sales.” The taxpayer’s payments to the contractor were therefore to be subtracted from the taxpayer’s “gross income from the property”.

Winfield Mining & Contracting Co. (Judge Murdock, June 25, 1954) 13 T. C. M. 571, #20,416 (M). The contractor extracted the coal, hauled it to the tippie, processed and shipped it; the contractor’s compensation rose automatically with the market price; the sales agent sent orders directly to the contractor; the contractor had the option to buy the underlying lease if taxpayer sold it; the taxpayer had no employees and comparatively minor expenses; the contractor had “the exclusive right to mine coal, without interference” from the taxpayer, and the contractor had “the entire responsibility for and expense of production, and had to look solely to the sales for payment.”

Paul E. Barry, Inc. (Judge Raum, January 24, 1955) 14 T. C. M. 37, #20,825 (M). The contractor assumed the risk of the enterprise, did its own prospecting for coal, was compensated by reference, among other factors, to the sales price, and had the right to, and did, sell to its own customers coal not taken by the operator.

In *Emil Usibelli* (Judge Murdock, June 30, 1954) 13 T. C. M. 602, #20,440 (M), the case now before this Court, the facts are unusual in that the taxpayer is a contractor hired by the United States Army to extract, grade, and load coal from deposits owned by the government for use by the Army. As the coal was never sold, the contractor’s compensation was determined exclusively by reference to his costs. The quantities of coal to be taken could be reduced by the government if its requirements changed. The contractor “was paid an agreed amount for the work which he performed,” and was held not to have an “economic interest” entitling him to depletion, following *Morrisdale*.

A pair of Tax Court decisions are significant because they are the only ones on which an Appellate Court has so far handed down an opinion. In *J. E. Vincent, et al.* (Judge Arundell, December 24, 1952) 19 T. C. 501, one of

the contractors (Summit Fuel), who was stated in the contract to be engaged in a "joint adventure" with the operator, had the obligation to process the coal and load it for shipment, and the right to take for its own account coal uncovered but not extracted upon termination of the contract by the operator. It was not to be paid by reference to the selling price, and looked to the operator for its compensation. Another contractor (Swaney) was to load and haul coal but not to process it, its work could be curtailed by the operator, and it looked to the operator for its compensation, but it was paid by reference to the market price. The facts of the *Vincent* case were thus somewhat confused and did not fall readily on either side of the line originally drawn by the Tax Court between the *Morrisdale* and *Ruston* cases. In any event the Tax Court decided for Vincent, holding that the contractors were not entitled to depletion and that the amounts paid to them should accordingly not be subtracted from the taxpayer's "gross income from the property" on which the taxpayer's depletion was computed. Subsequently in *B. H. Swaney & Sons, Inc.* (Judge Van Fossan, December 4, 1953) 12 T. C. M. 1371, #20,020 (M), the Tax Court, following its decision in *Vincent*, held that Swaney, who was one of Vincent's contractors, was not entitled to depletion.

The Government thereupon appealed the *Vincent* case to the Fourth Circuit, contending that the amounts paid to the contractors should be subtracted from Vincent's gross income for depletion purposes. Swaney also appealed to the Fourth Circuit, contending that it was entitled to depletion. The cases were argued together, as the dispute was primarily between Vincent and Swaney. The Court of Appeals for the Fourth Circuit, in an opinion entitled *Com'r v. Gregory Run Coal Co.* (April 9, 1954) 212 F. 2d 52, vacated the Tax Court's orders in both cases and remanded both cases. Vincent's petition for certiorari was denied, 348 U. S. 828. The opinion of the Court of Appeals relies almost exclusively on the *Burton-Sutton* decision, discussed

supra at p. 16; but the Court in *Gregory* seems to have been under the impression that the *Burton-Sutton* case dealt with "the right of the producer of the oil to a depletion allowance"; whereas in that case no one doubted the *producer's* right to depletion, as the issue there involved his *assignor's* right to depletion. The Court in *Gregory* seems to agree with us that an interest in the coal in kind is an indispensable ingredient in the right to depletion, setting forth at length the Supreme Court's language to that effect in *Burton-Sutton*, and singling out the statement in *Eastern Coal Corp. v. Yoke*, 67 F. S. 166 (the only other precedent mentioned in the *Gregory* opinion) that "one who has a *right to share in coal produced* also has a corresponding interest in the coal in place" (emphasis ours); but the Court in *Gregory* does not make clear which factors it considered gave the contractors a right to share in the coal. This might have been deduced from the facts that one contractor (Summit), though paid a flat price, was considered as mining "jointly" with the operator and had the right to take for its own account coal uncovered but not extracted on termination by the operator, and that the other contractor (Swaney) was paid by reference to the market price; but if this was the Court's reasoning, it does not clearly say so. The Court does state that the possibility of profit to the contractors was "dependent solely upon the extraction *and sale* of the product" (emphasis ours). The Court recognizes that a hireling who merely performs the labor of production for a fixed sum is not entitled to depletion; but concludes that the strippers before it were entitled to depletion because their rights "were completely dependent upon the extraction of the salable product." But would not the hireling's rights be dependent on such extraction also? Depletion would be allowable to every miner in the mine if dependence on extraction were the test. The *Gregory* opinion can thus hardly be considered as a thoroughgoing review of the authorities on this important question. We submit that the facts in the *Gregory* case, as

construed by the Circuit Court, are distinguishable from those in the case at bar, and in the typical anthracite stripping case, and that the Circuit Court's discussion of the principles involved is not sufficiently enlightening to be persuasive here.

After the Fourth Circuit's decision in the *Gregory* case, the next decision by the Tax Court on this question was in *Mammoth Coal Company*, discussed at page 29, *supra*. The Tax Court considered the *Gregory* decision and held that that case was distinguishable from the *Mammoth* case. The Tax Court's opinion did not retreat in any way from its position in the *Morrisdale* case. It is significant that this opinion was reviewed by the entire Tax Court and that none of its judges dissented.

Two other decisions, often considered in this connection, are distinguishable on their facts.

The first is *North Range Mining Company*, 46 B. T. A. 296 (1942), in which the Ford Motor Company, as the long-term lessee of an iron mine, turned over to the taxpayer the entire mine with all of its buildings and equipment, for five years. The agreement conferred very substantial rights upon the taxpayer. The taxpayer could fully exploit the mineral deposit and fully control the manner in which that was done. The taxpayer's interest in the ore deposit and the mining facilities was deemed to justify the requirement that the taxpayer should pay the local real estate taxes thereon. The taxpayer was required to deliver to Ford the quantities of ore periodically specified by Ford and was to be paid a fixed price per ton of ore so delivered, with adjustment in the price for changes in labor costs only; but the taxpayer was given the very important right to mine as much additional ore as desired and to sell this ore to vendees of its choice without any limitation as to price, the taxpayer being obliged only to pay Ford a royalty on such ore comparable to the royalty which Ford was obliged to pay to its lessor. That this right was not insubstantial is shown by the fact that the proportion of the total ore mined

by the taxpayer and sold to outsiders increased steadily during the taxable years in issue and amounted in the last such year to over 38% of the total ore mined. The taxpayer even entered into contracts for the sale of ore to outsiders covering a period of years. Thus the taxpayer's rights, not only in the ore to be sold to outsiders but also in that part of the deposit to be used to meet the requirements of Ford, were varied and extensive. The Government had conceded that, as to the ore sold to outsiders, the taxpayer was entitled to depletion, and that the royalty retained by Ford on that ore also concededly entitled Ford to depletion thereon. As to the ore not sold to others, but delivered by the taxpayer to Ford, it was mined by the taxpayer under the same broad powers of management and control, under the same agreement, as the ore sold to others. The Tax Court accordingly refused to treat the two types of production differently, and held that as the taxpayer was entitled to depletion on the one, it was similarly entitled to depletion on the other. If Ford had been required to pay the full market price for the ore delivered to it, and had retained a right to collect a royalty from the taxpayer on that ore, then Ford would have retained a depletable economic interest, the depletion of which would have been measured by that royalty; but as Ford chose to rely solely on the taxpayer's contractual obligation to sell ore to Ford, Ford had no economic interest in that ore in place, and hence was entitled to none of the depletion with respect to it. (It will be recalled that the Regulations deny depletion to a taxpayer having the mere right "to purchase the product upon production".) It followed that the taxpayer was entitled to all the depletion on the ore sold to Ford.

The *North Range* case was followed by *Eastern Coal Corporation v. Yoke*, 67 Fed. Supp. 166 (1946), which was decided by the District Court for the Northern District of West Virginia. An appeal by the Government was at first authorized, but then abandoned (1947 Prentice-Hall Fed-

eral Tax Service, para. 71,056). In that case the taxpayer² in 1936 leased certain coal mines from the Fordson Coal Company, subject to a royalty of 10¢ per ton, and agreed to buy from Fordson the equipment and improvements of the mines for \$1,235,000. The Government conceded that under this lease the taxpayer had a sufficient economic interest to support a deduction for depletion. Simultaneously with this lease the taxpayer contracted to sell to the Ford Motor Company about 6,000,000 tons of coal at \$1.56 per ton. In 1937, Fordson having assigned the lease to the Ford Motor Company, a new agreement was made, under which the taxpayer acquired from Ford a one-eighth undivided interest in all the coal in the leased tract, which taxpayer had the absolute right to extract and market for its own account if mined in the succeeding 15 years. The taxpayer agreed to sell about 5,000,000 tons of coal to Ford from the other seven-eighths interest. Although the 1937 agreement was not called a lease, the full incidents customary in mining leases were conferred upon the taxpayer, including the right to exclusive possession and operation of the property, the right to cut timber, and the duty to pay local taxes. The 1937 agreement provided that the taxpayer would receive \$1.46 per ton for the coal which it contracted to deliver to Ford, and that it would not be required to pay to Ford any royalty on the coal so delivered. The contract permitted adjustment for changes in labor costs only. The Court held that the taxpayer had the status of a lessee as to the other seven-eighths interest. It will be noticed that here also the rights of the taxpayer were far more extensive and varied than those customarily enjoyed by the stripping contractors. The parties had originally given the taxpayer the interest of a lessee, and the changes in the agreement

2. The amicus brief filed here for the stripping contractors says (at page 8) that this case involved a "strip-miner". As the published report is not clear, we inquired of George Richardson, Esquire, of Bluefield, W. Va., who represented the taxpayer in that case. He informs us that all of the mining there involved was underground, and that no strip mining was involved.

were so unimportant that that status clearly continued. The taxpayer had full control over a one-eighth undivided interest in the coal, which was sold to customers chosen by the taxpayer and at prices controlled by the taxpayer. On these sales the taxpayer had the risks and benefits of changes in the market price. The taxpayer had full control over the entire mining operation and purchased for over a million dollars the mine buildings and equipment. In view of the substantial rights of the taxpayer in the coal in place the Court could readily extend the principles of the leading cases cited above to hold, following the *North Range* case, that the taxpayer was entitled to depletion on the entire output. As to the one-eighth undivided share, the taxpayer's full power of extraction and sale for its own account gave it an undoubted economic interest; and as to the balance of the coal, the change from a lease requiring the sale of that coal at \$1.56 per ton less a royalty of 10¢ per ton, to an agreement under substantially the same terms, requiring the sale of the coal at \$1.46 per ton, was so slight as not to justify the disallowance under the agreement of the depletion which had concededly been allowable under the lease.

In both the *North Range* and *Eastern Coal* cases the taxpayers had substantially greater rights than those of the taxpayer in the case at bar. The taxpayer in one of those cases was expressly given an undivided interest in the coal in place, and in both cases the taxpayers had the right to sell a substantial quantity of the coal to vendees and at prices fully controlled by the taxpayers. The contractor here was given no share in the coal, either in place or upon extraction, and had no right to sell any of the coal to anybody. And it is impossible to say that the effect of the contract here is the same as a contract of sale less royalty payments (as in the *North Range* case), since the contractor here does not own anything to sell, and works or not as the Government determines; nor is it possible to say that the effect is the same as a lease (as in the *Eastern Coal* case),

since the contractor here was not found to have any rights of exclusive possession or independent operation, and had no right to sell any of the coal. The situations presented by those cases are fundamentally different from the situation of the contractor in the case at bar.

There remains the decision in *Oliver Iron Mining Company*, 10 T. C. 908 (1948) (appeal by Commissioner withdrawn, 1949 Prentice-Hall Federal Tax Service paragraph 71,141). There the taxpayer, as lessee of a deposit of iron ore, engaged an independent contractor to mine the ore, ship it, and market it. From the sales proceeds the contractor was to pay all the expenses of operation; to pay the royalties due to the lessor and the local taxes, for which the taxpayer remained liable; to retain four cents per ton of ore for its services; and to pay over the entire balance of the proceeds to the taxpayer. The Tax Court held for the taxpayer and refused to exclude from its gross income any of the amounts paid to the contractor.

If the taxpayer in the *Oliver* case was entitled to compute its depletion on the gross proceeds of the sale of ore, without excluding any amounts paid to others, why should not the typical operator, *a fortiori*, be entitled to do the same? If the contractor in the *Oliver* case was thus not entitled to a deduction for depletion, why should the taxpayer here be entitled to depletion? The contractor here has no exclusive possession of the coal site, but it appears that the contractor in the *Oliver* case had much larger rights of control, although as agent only. The contractors in both cases were compensated at a flat rate, and had nothing which could be considered as an "in ore" payment. The contractors in both cases were compensated in relation to *their costs*, and not by reference to the sale price of the coal. The contractor in the *Oliver* case could not sell coal for its own account, and in the case at bar cannot sell coal at all. The contractor in the *Oliver* case had wide powers of management, and if this were a controlling factor, the *Oliver* case (though certainly not the case of the ordinary strip-

ping contractor, with his very limited control) might well have followed the *North Range* and *Eastern Coal* cases, *supra*. The contractor in the *Oliver* case derived his income from the extraction of the ore; he dug it up and handled it as much as or more than the ordinary stripping contractor and as much as the taxpayer here; but that circumstance was not controlling either. It might be said that the contractor in the *Oliver* case was an "agent" of the operator and that therefore his status should be different from that of an "independent contractor". But in an area where the distinctions of legal title have been held not to be controlling, we submit that the distinctions between "employees", "agents", and "independent contractors", important as they may be in the law of torts and elsewhere, are not controlling either. The factor basically distinguishing the *Oliver* case, and with it the case at bar, from the *North Range* and *Eastern Coal* cases, is that in *Oliver*, as well as in the case at bar, the contractors had no right to the *natural resource itself*; in both cases they were hirelings, engaged to perform a service on behalf of another, and were paid a flat sum for those services; but they never took any of the resource for their own account, and thus never had the risks or the chance of profit of those whose interests were inextricably tied up with the mineral deposit. If the purpose of the statute itself, and all the teaching of the Supreme Court and other cases which have worked out its meaning, are to be duly respected here, they must lead to this very emphasis on an interest to exploit, and not merely to dig and haul, the raw material in place. And it is because the typical operator has that interest, and the contractor in the case at bar does not, that the contractor here should not be entitled to a deduction for depletion.

The Commissioner's Ruling on the Question Involved.

G. C. M. 26,290 (1950-1 C. B. 42) deals with the problem whether stripping contractors have "a depletable economic interest in the mineral in place." After a brief

general statement of the reasons why stripping is done through contractors (which statement, incidentally, does not refer to the important fact that such contractors frequently do not receive as compensation any share of the coal produced), the ruling proceeds to summarize the principles developed in the leading cases, correctly emphasizing that "it is enough if the taxpayer has retained a right to share in the mineral produced." The ruling quotes language from *Eastern Coal Corporation v. Yoke*, *supra*, indicating that depletion may be divided among "investors who, by contractual arrangements between themselves, agree to divide the resulting oil or mineral product or the proceeds from the sale of such product."

The ruling, however, then draws from the *Eastern Coal* case an inference which, when taken from its context in that case, leads to conclusions directly contrary to the principles developed in the leading cases and to the holdings in numerous other cases. "The position was taken by the court", the ruling says of the *Eastern Coal* decision, "that the right of a contractor to a specified amount per ton of mineral produced may constitute a right to share in production which marks ownership of a depletable economic interest in the mineral in place" (emphasis added). In the *Eastern Coal* case, it is true, the "contractor" received a specified amount per ton for a part of the production sold to Ford; but the "contractor" also received full control over the mine, a fixed plant for which it paid \$1,235,000, the right to sell to vendees of its choosing one-eighth of the production—all under arrangements which the court held were indistinguishable from the "contractor's" previous status as lessee, a status which concededly entitled it to depletion. This is a far cry from a holding that a true contractor, with none of the lessee's rights, and no right to share in coal in kind nor to control the sale of any coal—who indeed is paid for his services whether the coal is sold or not—has a "right to share in production" merely because his compensation, for reasons of convenience, is

measured by the quantity of the operator's raw coal material which he hauls to the operator's breaker. That the right to a specified amount per ton does not entitle the recipient to depletion is amply shown by *Anderson*, 310 U. S. 404 (1940), and by *Roeser & Pendleton* and *Oliver, supra*, in all of which depletion was denied to one who received a specified amount by reference to the quantity of oil or mineral produced. The compensation of the railroad which hauls the processed coal from the tippie is determined by reference to the quantity of coal produced and sold for railway shipment; does the railroad therefore have a right to share in the production sufficient to give it a depletable interest? The workman mining underground, whether as employee, or as "contract miner", is often paid by the ton of the operator's coal he brings to the surface; is he therefore entitled to depletion?

The ruling then holds without further discussion that, "dependent on their rights in respect of the properties involved", the stripping contractors are entitled to depletion. If the stripping contract may be terminated by the operator on short notice and without damages, the ruling correctly concludes that the contractor would not be entitled to depletion. There would be no objection to the ruling if it also held that the contractor would not be entitled to depletion under certain other circumstances—for example, where the contractor has no share in the coal produced, or no share in the proceeds of the sale of coal. But if the ruling holds that the possibility of having his contract terminated on short notice is the only factor which would deny depletion to a stripping contractor engaged to strip and load the operator's coal, then the ruling is flatly contrary to the law as it has developed in the cases above discussed.

It may well be doubted whether the ruling was intended to have any such broad and unprecedented construction. Although in its third paragraph, in paraphrasing Section 23(m)-1 of the Regulations, the ruling refers to income derived from "extraction" of the mineral, rather than

to income derived from "severance and sale" of the mineral (as the Regulations, much more consistently with the decided cases, provide), nevertheless, in its sixth paragraph and several times in its ninth paragraph the ruling refers to "severance and sale" or "extraction and sale" as the necessary and exclusive source of the contractor's compensation if he is to deduct depletion. But as we have seen, the contractor in this proceeding does not derive his compensation "from the extraction and sale of the coal", as he does not sell or have any right to sell coal and his compensation depends on rendering services, regardless of whether coal is sold or not. Accordingly it seems probable that the true construction and intent of G. C. M. 26,290 is to deny the depletion deduction to Usibelli, regardless of whether his contract could be terminated without damages. The contrary construction would be fundamentally inconsistent with the principles and holdings of the court decisions in this field.

A Holding That the Contractor in This Case Is Entitled to Depletion Would Not Only Be Contrary to the Congressional Intent and to the Decided Cases, But Would Also Result in Extending Depletion to Many Taxpayers for Whom It Was Never Intended.

The original purpose of Congress in allowing the depletion deduction was to restore to the owner of the coal in place the value of his interest in it. By changing the basis of the deduction from the original cost to 5% of the "gross income from mining" the coal, the purpose of Congress was to encourage the discovery and recovery of coal deposits.

Neither the typical stripping contractor nor the contractor in the case at bar has any proprietary interest in the coal in place which will be depleted as the coal is removed. Nor does he have any part in the discovery of the deposit. He is merely hired by the owner of the coal to dig it out for him. Nor would a depletion allowance to such

contractors stimulate the discovery or opening of new coal mines.

Acceptance of the taxpayer's position here would result in a complete subversion of the purpose and policy of the statutory provision. It would extend the deduction to a host of contractors for whom it was manifestly never intended.

For example, many mine operators engage individuals as "contract miners" to recover the raw coal from a section of the underground mine. Sometimes the contract miners are paid by the hour; often, and more conveniently, they are paid by the quantity of raw coal material produced. These contractors typically furnish their own light tools, and can readily move from one operator's mine to another. Was it ever intended that the deduction for percentage depletion—the means of recovering the taxpayer's interest in the coal in place—should be shared with all these pick-and-shovel contract miners?

What about the contract truckers, who are often engaged to haul the operator's raw coal material to the operator's breaker from his more distant mine openings? They are paid by the quantity of material hauled; they are interested in the sale of the coal in the sense, but only in the sense, that unless the operator sells enough coal to stay in business they will have to render their trucking services to someone else. Are they to be entitled to depletion?

What about the utility whose branch line was built especially to serve the operator's mine? What about the railway whose spur leads only to the breaker? They have invested heavily in the expectation of profit from the coal deposit. In a sense they, too, derive their income solely from the extraction and sale of the coal, but only in the sense that unless the operator continues in *his* business of mining and marketing coal, *their* investment will be lost. They may compute deductible *depreciation* by reference to the exhaustion of the deposit, and if the mine should be exhausted prematurely, they might have a deductible loss

on abandonment. But is their interest in the coal sufficient to entitle them to deduct depletion as well?

What about contractors hired to drive underground tunnels through rock, so as to gain access to remote coal deposits? What about contractors hired to lay railroad tracks in the mine, or to install timbers? These and many other independent contractors depend ultimately for their profit on the severance and sale of the coal, but it has never been suggested that they are entitled to a depletion allowance. Like these other contractors, the taxpayer in the case at bar got, by his contract, not an economic interest in the coal in place, but merely an economic advantage from a contractual relation with the owner of the deposit.

If the depletion deduction is to be kept within the Congressional purpose, if it is to be allowed in a manner consistent with the principles developed in the decided cases, then the deduction must be limited to those who are actually carrying on the mining business, as evidenced by their interest in the coal itself, and their right to share, for their own account, in the proceeds from its sale. This the contractor in the case at bar, like the typical stripping contractor, does not have. Accordingly, the taxpayer here should not be entitled to a deduction for percentage depletion.

The decision of the Tax Court was, therefore, correct and should be affirmed.

Respectfully submitted,

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No. 14560

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY, a Corporation,

Appellant,

vs.

AUDRA H. PALMER,

Appellee.

Appeal from the United
States District Court for
the District of Arizona

BRIEF OF APPELLANT

SCOVILLE & LINTON

Attorneys for Appellant

FILED

FEB - 7 1955

PAUL P. O'BRIEN,
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IN THE

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Appellant,
vs.

AUDRA H. PALMER,
Appellee.

Appeal from the United
States District Court for
the District of Arizona

BRIEF OF APPELLANT

Jurisdiction

The above-entitled proceeding arose upon an appeal from a judgment entered in an action by Audra H. Palmer, hereafter called Palmer, against State Farm Mutual Automobile Insurance Company, a corporation, hereafter called Company. The complaint is on an automobile liability insurance policy issued by Company to one Ralph E. Nollner, hereafter called Nollner. The complaint seeks judgment for \$10,000, together with costs and interest at the rate of 6% per annum from January 18, 1951 by Palmer against Company as a result of Palmer's judgment obtained in the Superior Court of Maricopa County against Nollner, who was an insured of Company at the time

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an accident occurred in which Palmer, as a guest passenger of Nollner, received certain injuries.

The action is one between citizens of different states and the amount of the controversy exceeds \$3,000, exclusive of interest and costs. The jurisdiction of the District Court rested upon diversity of citizenship. 28 *U.S.C.A. Sec. 1332*

The action was tried by the District Court sitting without a jury upon the complaint of plaintiff. (R. 3) The District Court by minute order found the issues made by the complaint and the answer of Company in favor of the Plaintiff Palmer. Findings of Fact and Conclusions of Law were submitted by Plaintiff Palmer and over objection of the Defendant Company were approved and settled by the Court and judgment entered finally in the amount of \$10,000, together with interest thereon at the rate of 6% per annum from January 18, 1951 until paid, together with her costs therein incurred. The said judgment having become final, the present appeal is predicated upon 28 *U.S.C.A. Sec. 1291*

Statement of the Case

On March 16, 1946, Company issued and delivered to Nollner its automobile liability Policy No. 33000-FS-03 which was in full force and effect for a period expiring on March 16, 1948. On January 17, 1948, Nollner was driving his 1946 Studebaker Sedan which was covered under the policy aforesaid and at said time Nollner's wife was riding with him in the front seat of the car and the Plaintiff-Appellee, Audra H. Palmer, was riding in the rear seat of the automobile which was also occupied by a Mrs. Hillyer, daughter of Nollner. An accident occurred wherein Mrs. Nollner was killed and Mrs. Palmer and Mrs. Hillyer were seriously injured.

The Policy (Defendant's Exhibit 30-R.292) provided, among other things, as follows:

"3. INSURED'S DUTIES IN CASE OF LOSS. As a condition precedent to the enforcement of any right under the policy, the insured shall * * *

"(c) ASSIST AND CO-OPERATE with the Company in investigating, securing and giving evidence, and in the conduct of suits and by attending hearings and trials as well as in obtaining reasonable repairs for the damage done to the described automobile.

* * *

"5. ACTION AGAINST COMPANY.

"(a) With respect to all coverages no action shall lie against the Company unless, as a condition precedent thereto the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed."

After the accident, Nollner gave Company due notice of the accident.

The Appellee, Palmer, commenced an action in the Superior Court of Maricopa County, Arizona, hereinafter referred to as Superior Court action, being Cause No. 65336, for bodily injuries she received in the accident aforesaid.

On January 11, 1951 after counsel for Nollner had withdrawn from the cause, a trial was held in the nature of a default action, and there was rendered on January 18, 1951 a judgment in the sum of \$27,500 in favor of Audra H. Palmer and against Ralph E. Nollner. On April 10, 1951, the Sheriff of Maricopa County, Arizona returned to the Superior Court, wholly unsatisfied, the execution issued on the judgment. Appellee-plaintiff thereafter made demand upon Company for payment of the policy limits of \$10,000 for injuries to one person which demand was refused.

Thereafter, on May 15, 1951, suit was commenced in the Federal District Court of Arizona by Audra H. Palmer against Company.

The record shows that the Superior Court action was set for trial on 5 different occasions. It further shows that the Superior Court action was continued three times as a result of motion for continuance filed by Nollner's attorney, one time by motion of the court, and on the fifth setting the motion for continuance was denied and counsel for Nollner, who had been employed by Company to represent Nollner in accordance with the terms of the policy, withdrew.

For convenience of the Court, we believe it advisable to set forth separately the acts occurring prior to four of the trial settings.

A. FACTS PRIOR TO FIRST TRIAL DATE—JUNE 6, 1950

On May 10, 1950, a letter was written by Company's Superintendent in Berkeley, California, to Denver Claims Office, advising the Denver Claims Office to be alerted for a request from Phoenix counsel to Nollner for Nollner to proceed to Phoenix. (Plaintiff's Exhibit A - R. 139). Thereafter, Nollner's attorney wrote to Nollner in Denver, requesting his appearance in time for the depositions and attendance at two trials (Defendant's Exhibit 2 - R. 64-65). Although not material to this appeal, it is important to point out that there was a suit filed by Mrs. Hill-yer which was set for trial on June 1, 1950 and the suit of Palmer was set for trial on June 6, 1950.

Thereafter, Company's attorney in Denver advised the Phoenix attorney that Nollner refused to come to Phoenix for the trial during June but could come any time after July 1. (Defendant's Exhibit 3 - R. 67). At the same time Company's attorneys in Denver questioned Nollner and among other

things set forth his duties and obligations under the policy and requested the attendance of Nollner at the trial. (Defendant's Exhibit 4 - R. 68-80). Nollner at that time requested the trial setting be continued until after July 1. Thereupon Phoenix counsel for Nollner filed a motion for continuance which was argued on May 27, 1950 and the case was reset for July 13, 1950. (R. 80-81).

B. FACTS PRIOR TO SECOND TRIAL—JULY 13, 1950

Defendant's counsel after the resetting of the case advised Nollner of the trial date of July 13 and requested that he be in Phoenix on July 10 so that his deposition could be taken by Palmer's attorneys and advised that arrangements would be made to tender travel expense to Nollner prior to his trip to Phoenix. (Defendant's Exhibit 6 - R. 85). On the same date a letter was written by Nollner's Arizona attorneys to Company's adjuster in Denver, making a like request upon the adjuster. (Defendant's Exhibit 7 - R. 86-87). On July 8, 1950, Nollner wired the Phoenix attorney that it was inadvisable for him to leave Denver for the Palmer trial and expressed hope that trial could be postponed. (Defendant's Exhibit 8 - R. 89).

Thereafter a motion for continuance was filed by Nollner's Phoenix attorney, requesting the continuance. Such a motion was heard by the Superior Court on July 12, 1950, and the Superior Court granted the continuance and reset the case to September 25, 1950. (Defendant's Exhibit 10 - R. 91-96).

On July 13, Nollner's Phoenix attorneys wired Nollner that the case had been continued to September 25, 1950 (Defendant's Exhibit 12 - R. 99).

C. FACTS PRIOR TO THIRD TRIAL DATE—DECEMBER 19, 1950

Above you will note that the case was continued to September 25, 1950; however, the Court's calendar required the Judge to reset the case for December 19, 1950. (R. 100) Thereafter, Nollner's Phoenix attorney advised him of the December 19, 1950 trial setting. (Defendant's Exhibit 13 - R. 101).

Again, on December 2, 1950, Nollner's Phoenix attorney advised him that the December 19 trial date would probably not be reached and that it would be heard perhaps a week later. (Defendant's Exhibit 14 - R. 103). Thereafter under date of December 17, 1950, Nollner wired his Phoenix attorneys that it was impossible to be in Phoenix for the trial on the 19th of December. (Defendant's Exhibit 16 - R. 106). Such wire was confirmed by letter of the same date. (Defendant's Exhibit 17 - R. 107).

On December 15 a wire had previously been received from Company's Denver representative that Nollner would not attend the December 19 trial. (Defendant's Exhibit 15 - R. 108).

A third motion for continuance was filed on December 17, 1950, and the case was reset for January 11, 1951. (R. 109).

Nollner was advised of the January 11 trial setting by telegram of December 19, 1950 from Nollner's Phoenix attorneys (Defendant's Exhibit 18 - R. 110). Thereafter letter was written by Nollner's Phoenix attorney on December 22, requesting Nollner be in Phoenix on January 10, 1951. (Defendant's Exhibit 19 - R. 111-112)

D. FACTS PRIOR TO JANUARY 11, 1951, TRIAL DATE

On January 9, Nollner's Phoenix attorney was advised by Company's Denver office that Nollner would be in Phoenix at 8:00 p.m. on January 10. (Defendant's Exhibit 20-R. 114). However, a wire was received by Nollner's Phoenix attorney on January 10,

advising that Nollner would not attend the trial (Defendant's Exhibit 21 - R. 116). Thereupon a motion for continuance was again filed by Nollner's Phoenix attorney (R. 114-115). A complete transcript of the proceedings on the argument for motion for continuance is set forth in Defendant's Exhibit 22, R. 117. The hearing on the motion for continuance was had on January 10, 1951 late in the afternoon and continuance was denied at that time. (Defendant's Exhibit 22 - R. 118). On January 11, 1951, Nollner's Phoenix counsel filed a motion for leave to withdraw from the case which motion for leave to withdraw was argued and finally granted by the Court. (Defendant's Exhibit 22 - R. 129).

On January 10, 1951, Company's Denver attorneys met with Nollner and discussed his appearance at the trial in Phoenix and questioned Nollner concerning his failure to attend, demanded Nollner's attendance and offered expense money for the trip. (Defendant's Exhibit 25 - R. 241). At that time Nollner's answers indicated that he would determine whether or not he would come to Phoenix at a future time if a continuance was granted and that he had permission from his employer to leave Denver for the trial of January 11, 1951, and that his employer had left the matter up to Nollner. (Defendant's Exhibit 25 - R. 248, 251). In other words, Nollner gave no assurance to Company's Denver attorney that he would ever come to a trial at a later date.

Thereafter, on January 11, Company's Denver attorneys wrote a letter to Nollner, setting forth what had happened in Phoenix regarding the motion for continuance and that Nollner's Phoenix attorney would withdraw from the trial. (Defendants Exhibit 27 - R. 254-256.)

Prior to the trial of the Superior Court action, Plaintiff's attorney had advised Nollner's Phoenix attorney that he was going to have present at the trial a Mr. Height who was the driver of the adverse car involved in the accident

and who had not been located by Company's attorneys or adjusters. (R. 180-181). There were other witnesses whose testimony might have disputed that of Nollner's (R. 162-163) and at the actual trial of the cause a Mr. Harmonson, brother of Appellee-plaintiff, testified to an alleged admission made by Nollner (R. 183-184). It was the opinion of Nollner's Phoenix attorney that there would have been an excellent chance for a verdict for the Defendant Nollner if he had been personally present at the trial and the attorney did not feel he could win the case if it had proceeded to trial with Nollner absent. (R. 167).

The deposition of Nollner was taken by stipulation of the parties in Denver, Colorado on June 21, 1950. This deposition showed no collusion on the part of Company or any of its agents in attempting to prevent Nollner from coming to the trial and is a sworn statement by Nollner as contrasted to the letter set forth in Finding of Fact No. 7, allegedly written by Nollner on July 8, 1950, which is contended to indicate collusion.

The present case was tried in District Court on February 7, 8, and 12, 1952. and thereafter the Court took the matter under advisement and allowed counsel to submit briefs. Thereafter on October 22, 1953 (R. 9) the Court ordered judgment be entered for the *Defendant* upon Findings of Fact and Conclusions of Law to be submitted under the rules. Defendant's proposed Findings of Fact and Conclusions of Law were thereupon submitted and Plaintiff-appellee's objections thereto and proposed Findings of Fact and Conclusions of Law were submitted.

On June 22, 1954, the District Court directed that the judgment entered for the Defendant be vacated and that judgment be entered for Plaintiff as prayed for in the Complaint and for counsel to submit form of judgment. Thereafter Plaintiff filed proposed Findings of Fact and Conclusions of Law and Defendant filed objections and Request for Additional Findings of Fact and Conclusions of Law, and Findings of Fact and Conclusions of

Law as finally settled by the Court were signed by the Court on July 6, 1954 and thereafter judgment entered. Whereupon Defendant moved that the judgment be vacated and a new trial be granted and the Findings amended which motion was denied on August 24, 1954, and docketed on August 27, 1954, and Notice of Appeal was filed on September 17, 1954.

A somewhat unusual factor of the case is that a majority of the testimony at the trial was testimony of Company's counsel, Walter Linton, who was also Nollner's Phoenix attorney employed by Company under the policy and incidentally the writer of this brief. The only witness for the Plaintiff at the trial of the District Court action was Mr. Elias M. Romley, attorney for Palmer in the Superior Court action, the District Court action and in this Court.

Specifications of Error Relied Upon

I.

The District Court erred in making Finding of Fact No. 3 for the reason:

a. The last sentence in said Finding fails to set forth the insured's duties as defined in said policy, which was the only evidence as to insured's duties and is therefore contrary to the evidence. The duties set forth in the policy are a condition precedent to the enforcement of any right under the policy. Therefore, said Finding is incomplete and contrary to the undisputed evidence.

II.

The District Court erred in making Finding of Fact No. 7 for the reasons:

a. Said Finding is based upon inadmissible hearsay evidence.

Such evidence was an excerpt from a letter written by Nollner to his daughter, Mrs. Hillyer, referring to alleged statements of Company's Denver attorney and adjuster to Nollner. (R. 277-278)

b. The Fact set forth in said Finding is immaterial for the reason that the trial was reset four additional times and continued three times at the request of Nollner and evidence of failure to attend trial in July 1950 is immaterial since the trial was held on January 11, 1951.

c. Said Finding is contrary to all of the testimony of witnesses Eckroth, Wormwood and Linton, and the testimony of Nollner given in the deposition after the date of such alleged statement.

III.

The District Court erred in making Finding of Fact No. 9, said Finding, except as to the first two sentences thereof, being immaterial, for the following reasons:

a. All matters set forth relate to events after the continuance was denied by the Court and is therefore immaterial.

b. As to that portion of Finding of Fact No. 9 (1), Section 21-802, A.C.A. 1939 requires this identical offer on the part of a party contesting a motion for continuance. Therefore, under the law the offer had been made prior to the denial of the motion for continuance and it is immaterial that the offer was made thereafter.

c. The offered stipulation, labeled "2", is immaterial since said offer was not for the purpose of allowing Appellant to attempt again to have Nollner appear but merely for Appellant to prepare the defense without Nollner's presence.

d. Offered stipulation, labeled "3", is immaterial since a waiver of the jury was after the continuance was denied and further such offered stipulation did not cure Nollner's failure to appear and defend.

e. Offered stipulation, labeled "4", is immaterial since it did not cure Nollner's failure to appear and defend.

f. Refusal of Defendant's counsel to try the case upon the offered stipulations is immaterial since Nollner had breached a condition precedent in the contract, that such breach was material and continued to the time of the trial and prejudice resulted to Appellant from Nollner's failure to appear.

IV.

The District Court erred in Finding of Fact No. 12 for the reasons:

a. An offer of settlement is no evidence of waiver of the breach and, therefore, is immaterial. The offer was not an admission of liability since there was consideration for an offer to dispose of any further liability, which liability included trial in the District Court and this appeal.

b. The last portion of Finding 12 is immaterial since the discussion between appellant and appellant's counsel concerning the motion for New Trial and Appeal does not tend to prove or disprove liability on this appellant.

V.

The District Court erred in Finding of Fact No. 13 for the reason:

a. Said Finding is contrary to the evidence, which did not show that counsel for Nollner was fully and adequately prepared after learning of Nollner's refusal to appear.

b. Said Finding is contrary to the evidence and there was no evidence that counsel for Nollner was at any time prepared to defend the case in Nollner's absence but had specifically advised Nollner that he would withdraw in the event of Nollner's absence.

c. Said Finding is contrary to the undisputed evidence which showed it was impossible to present any defense available to Nollner in his absence.

d. Said Finding is contrary to the undisputed evidence which showed that plaintiff's counsel had threatened certain adverse witnesses would appear, thus making it impossible to properly defend without Nollner's presence to contradict or explain plaintiff's adverse witnesses.

VI.

The District Court erred in Finding of Fact No. 14 for the reasons:

a. Said Finding is contrary to the evidence since the insurance contract specifically required Nollner to attend trial and such requirement was a condition precedent to liability.

b. Such Finding is contrary to the evidence which showed conclusively that Nollner's presence was necessary to refute admissions and explain or contradict stories of possible adverse witnesses.

c. Said Finding is contrary to the undisputed evidence that shows that Nollner's absence was not excusable.

(1) Nollner's statements to Wormwood conclusively showed he could have come to the trial if he had wanted to do so and that he alone decided not to attend and that he would

make future decisions as to whether he would or would not attend the trial.

(2) Nollner's absence at the trial was a voluntary act and is not excusable. Therefore said finding is contrary to the evidence.

VII.

The District Court erred in making Conclusion of Law No. I since said Conclusion is contrary to the evidence.

a. The facts show a material breach of the contract upon which a prejudice can be inferred.

b. There were no facts found by the Court upon which to base the conclusion that the defendant was not prejudiced.

c. Failure of Nollner to appear and defend when inexcusable and a voluntary act, is a material breach as a matter of law and as matter of law the appellant was prejudiced.

d. The last sentence of said Conclusion is contrary to all of the evidence which shows conclusively there was a breach of the cooperation clause of the policy.

VIII.

The District Court erred in making Conclusion of Law No. II for the reasons:

a. Such conclusion is contrary to the undisputed evidence as there is no valid evidence of a waiver on the part of appellant.

b. That the undisputed evidence showed that Nollner did violate the cooperation clause of the policy.

c. Failure to attend the trial by the terms of the policy contract was a condition precedent to liability and the Court has no right as a matter of law to prevent the assertion.

IX.

The District Court erred in making Conclusion of Law No. III for the reasons:

a. That the undisputed evidence shows the assured failed to attend the trial and that such failure breached the insurance contract which prevents plaintiff's recovery thereunder.

b. Appellee-plaintiff's rights to proceeds of the insurance policy are no greater than those of Nollner, the insured.

c. Nollner's breach of the policy was a breach of a material condition and insurer was prejudiced thereby. Therefore, there can be no liability to the plaintiff under the policy.

X.

The District Court erred in making Conclusion of Law No. IV for the reasons:

a. Findings of Fact and Conclusions of Law are erroneous as set forth previously.

b. The co-operation clause of the policy required Nollner to appear at the trial as a condition precedent to liability and Nollner's failure to appear breached the policy, thereby giving appellant at its option the right to terminate any liability under the contract which option appellant exercised.

c. The failure to attend was a substantial and material breach of the policy contract and the appellant was prejudiced thereby.

Summary of Argument

This argument is divided basically into six parts and under six headings.

The first is that the Company used all reasonable diligence to secure Nollner's attendance at the trial. It did what it agreed to do under the policy, that is, offered to pay Nollner's expenses of traveling to the place of trial. It applied for four separate continuances, purportedly to suit Nollner's convenience. Three of the continuances were granted; the fourth was denied. Thereafter counsel withdrew from the case with permission of the trial court. There was no evidence of collusion between the Appellant and Nollner and every effort possible was made to have Nollner present at the trial. The Company went to great expense to point out to Nollner the reasons that his presence was necessary and to warn him of the actions the Company would take if he refused to appear.

The second heading, which logically follows from the first, is that Nollner's absence was absolutely inexcusable. His many wires and requests for continuances always stated he hoped a continuance could be granted and gave some reason related to his job as to why he could not come; however, when it came down to the final questioning, he admitted the day before the actual trial that he had permission from his employer to come to Phoenix for the trial; he admitted he had been offered expenses for the trip and admitted that he alone would decide whether or not it was convenient, and he had made the decision that he did not think it was convenient for him to come to the trial and made the further statement that he alone would decide in the future whether or not he should attend the trial. In other words, his actions and statements show that his failure to appear was because of his own voluntary act and he was prevented by no one from appearing.

Next we take up the fact that Nollner's presence was necessary. Much could be said at this time concerning this phase of the argument. We feel that inasmuch as we are talking about the trial of lawsuits with which this Court is more familiar than the writer, there is no necessity of dwelling at great length on this subject. Nollner was the only eyewitness the Company had to the accident. He was the driver of the car. He knew more about the accident than anyone else and without Nollner the Appellant's position to try the case was not only materially prejudiced but practically impossible of defense. Appellee's counsel, apparently, as he says, to scare Appellant's counsel, threatened the appearance of other witnesses to the accident who had not been located. What was the Company to do but to demand that Nollner be there to explain such stories as might be brought forth by these threatened witnesses? The evidence shows that admissions against interest not previously brought forth were brought into the trial of the cause, which undoubtedly Nollner could have explained.

The next heading gets to the very essence of the case and that is Nollner breached the co-operation clause, which required by the terms of the contract that Nollner appear and attend the trial, and this condition was a condition precedent and is set forth specifically as such a condition precedent to Nollner's rights and to the rights of anyone bringing an action under the policy. There is no question, and it is completely undisputed, that Nollner did not attend the trial. Therefore, there is no question but that Nollner failed to attend the trial and that he breached this condition precedent of the policy. The District Court in its Finding of Fact No. 14 found Nollner's presence under the circumstances was neither required nor necessary. We submit that both words "required" and "necessary" were improper in the Finding, for the policy required his attendance and, as set forth above, his attendance was necessary. In this regard, the Appellate Court has a right to correct findings of the District Court when they are clearly erroneous and the rule of this Circuit

is that a finding is clearly erroneous when, although there is evidence to support it, the Appellate Court is left with a definite and firm conviction that a mistake has been committed.

The Appellant did not waive Nollner's attendance at the trial or his breach of the condition requiring his attendance. After it was apparent that the case would not be continued, that Nollner would not appear, and that, therefore, no adequate defense could be presented, the Company made an offer of settlement as a practical measure to avoid any possible litigation upon the policy. Ample consideration for offer of settlement is apparent. This appeal proves that point.

Nollner's failure to attend the trial was the breach of a material condition of the policy which condition is made a condition precedent. Certainly this is not an inconsequential or immaterial condition but one that goes to the very essence of an automobile liability policy. Such a contract is based upon protecting the assured from a loss due to an automobile accident and the Company in such policies agrees to defend at the Company's expense. Therefore, having a defendant help defend is material to the defense of any lawsuit and is certainly a material condition of the policy. The failure to have Nollner available for the trial undoubtedly resulted in a prejudice to the insurer. The fact that the Company felt that it had a good defense on the facts of the accident and the additional facts that without Nollner's being present, even though his deposition was put in evidence, and judgment was rendered in the amount of \$27,500 against Nollner, shows that his absence prejudiced the insurer. The affidavit on behalf of Nollner appearing in Plaintiff's Exhibit 1, R-338, 339, shows that the facts of the accident were decidedly in favor of Nollner; and, yet, with Nollner not in Court after the trial, the Superior Court took the case under advisement for eight days, a judgment was rendered against Nollner and it was the opinion of Appellant's trial counsel that

there was an excellent chance to successfully defend the case had Nollner been present.

Argument

I.

The Appellant Exercised Diligence in Attempting to Secure Nollner's Attendance at the Superior Court Trial.

As has been set forth in the Statement of Facts, the record is replete with the many requests made by Appellant to Nollner, through its agents and attorneys, in attempting to secure Nollner's presence at the trial of the Superior Court action. These efforts commenced in May, 1950 and continued up to the trial time in January, 1951. The record shows the number of registered letters written to Nollner advising him in sufficient time for each trial setting, and each time offering to pay his traveling expense. The Policy (Defendant's Exhibit 30—R. 290) under "Supplementary Agreements" 1. (b), provides:

"The Company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request."

Therefore, it is seen that the contract of insurance between Appellant and Nollner provided that Appellant's only duty was to pay expenses incurred by Nollner and not any loss of earnings. There is no contention whatsoever that Nollner ever demanded loss of earnings.

Each time Nollner was advised of the trial date he was also advised of his duties and obligations under the policy. The evidence shows that Nollner realized his duties to the insurer.

Plaintiff-Appellee's attorney does considerable insurance litigation in the Arizona courts and District Court (R. 311) and the District Judge questioned this attorney when he was testifying as follows:

"The Court: If you and Mr. Linton were in opposite places would your testimony be the same?

"The Witness: If the Court please, I don't feel there was any prejudice in this case for many reasons that are contained in this file.

"I think the question of the good faith and bad faith of the defendant enters into it. There is in the file here a statement in October, 1949, from Mr. Jageman to the Berkeley office, October 19, 1949. Mr. Jageman wrote Mr. Nelson:

"'Our only chance of avoiding litigation is that the Statute of Limitations will expire in just three months and our assured is somewhere in Texas. When attorney Romley contacts us again we will ask for him to list the special damages but this is more of a dilatory action than anything else.'

"Elsewhere in the file references to refusal and suggestions of refusal of the assured to attend indicate in my mind an effort on the part of the defendant in this case, the insurer, to do everything it could possibly think of to avoid a recovery by the plaintiff in this case. I firmly believe that the insured and the insurer colluded to that end." (R. 327, 328)

In other words, the Court was asking Appellee's attorney "If you were representing the insurance company and Mr. Linton were representing the plaintiff, would your testimony be the same?" The answer given by Mr. Romley definitely shows that he did not answer the question and it is submitted that there is good reason therefor. For, we submit that under the evidence in this case, it is shown that the insurance company exercised all diligence required of it to have Nollner present at the trial of the case.

In citing the above testimony of Mr. Romley, there appears in it his argument that there is an inference of collusion on the part of the insurance company. We submit that there is no evidence of collusion and that the evidence completely refutes this contention. The only other item in the record is the Finding of Fact No. 7 of the District Court which in effect states that this hearsay testimony, which is in effect "hearsay upon hearsay", is that Nollner could not afford to jeopardize his work and that whatever happened he should stay in Denver, since he could not possibly spend a week away from Denver at that time. Let it be borne in mind that this alleged statement which was objected to at the trial as "hearsay" was made purportedly on July 8, 1950, at which time Nollner had previously requested continuance until after July 1. The matters contained in Finding of Fact No. 7 must necessarily relate to the first trial setting of June 1, 1950. This alleged fact was refuted by both Attorney Wormwood of Denver and the adjuster Eckroth of Denver, at the trial of the cause. However, this Finding is immaterial as to what happened at the later trial setting dates and certainly is not evidence of collusion. Therefore, we submit that the Statement of Facts and exhibits and records supporting the Statement of Facts shows, beyond a question, that the Appellant did exercise all diligence that could have been required of it to have Nollner present at the trial. Certainly, as we will discuss later, we submit that his presence was necessary.

II.

Nollner's Absence from the Trial Was Inexcusable

There are several cases holding that where the assured's absence from the trial is excusable that that is not lack of cooperation on the part of the assured. Those present unusual factual situations which have no relevancy to the issue involved. We feel that the following testimony by Kenneth Wormwood, which is uncontradicted and is substantiated by the evidence set

forth in Defendant's Exhibit 25, R. 248, definitely proves that Nollner could have attended the trial had he wanted to.

"Q. At the time of January 10—I don't recall that I asked you—you did request Mr. Nollner to come to Phoenix for the trial of January 11?

"A. I did, sir.

"Q. Did he agree to come?

"A. No, he did not.

"Q. Did he state he would not come or could not come?

"A. He stated that it had been left up to his discretion as to whether he should come or not and he said in his discretion he would not come at that time.

"Q. And did you ask him if there was any assurance that he would come at any future time?

"A. I did, sir.

"Q. And what was his answer to that?

"A. He stated if it fitted to his work, all other things being equal, he would come. If it didn't fit to his work he wouldn't come.

"Q. And did he state to you or did you ask him whether or not—who would be the one or whether he would be the one to determine about his work?

"A. He said he would be the one who would determine that.

"Q. In other words, he said he would determine whether or not it was convenient for him to come?

"A. That is right.

"Q. That was after your knowledge of a few continuances?

"A. Yes.

"Q. He gave you no assurance he would come at a later date?

"A. No assurance he would ever come.

"Q. At that time I believe you stated that you did offer and tender expenses and plane fare for him to come there?

"A. Yes, and other expenses as well.

"Q. Mr. Ekroth was present at the time of that court reporter's statement?

"A. Yes.

"Q. Did you advise him if he refused to come what would be the consequences?

"A. Yes.

"Q. What did you tell him, as best you can recall?

"A. My recollection is I called his attention to the general policy terms regarding cooperation, advised him if he refused to attend the trial the company could withdraw and that there might be default judgment entered against him.

"Q. Did you on January 11 in your knowledge advise him that I was going to withdraw from the trial of the case?

"A. I did that on January 11.

"Q. You wrote him a letter, did you?

"A. Yes, I did, sir." (R. 251-252)

Thus it will be seen that Nollner himself determined whether or not he would come to the trial and he gave no assurance that he would ever come at a later trial date. In Defendant's Exhibit 25—R. 248, the following quotation is observed:

"Q. Now, as I understand it, you could go if you wanted to; that is, your commander has indicated that he will leave it up to you, is that correct?

"A. That is correct.

"Q. And your decision is that you are not going?

"A. That is correct.

"Q. And we have no assurance that you would go at any future time if there was another continuance?

"A. If it fitted to my work, all others things being equal, I might consider it.

"Q. But if it didn't fit your work you would not go the next time?

"A. That is correct.

"Q. And you will be the one to determine whether it fits your work?

"A. That is correct." (R. 248)

Thus it is shown that he had permission from his employer to come to the trial and the employer had left it up to him and he had decided it did not fit in with his work and that he was the one who had made such determination and that the decision not to come was Nollner's and no one else's. It is shown that expense money was tendered to him and that he had on January 8 made plans to fly to Phoenix for the trial and then cancelled those plans.

In the case of *Hartford Accident & Indemnity Co. v. Partridge*, 183 Tn. 310, 192 S.W. 2d 701, the assured did not appear at the trial on the morning of the trial. The court refused to grant continuance but postponed the hearing until that afternoon. Company attorneys were not able to locate the assured and withdrew because of failure to co-operate. It was determined later that the

assured had become intoxicated and for that reason did not appear at the trial. The Court in that case stated:

" * * * In more than one of these cases a showing of 'manifest indifference' is recognized as the equivalent of a refusal to co-operate. It can hardly be said that 'indifference' was not manifested by the course of conduct of the insured. * * * "

Certainly the least that can be said for Nollner's refusal is that it was a manifest indifference which was the equivalent of a refusal to co-operate.

Thus we contend that Nollner's failure to attend the trial was of his own volition, not caused by any act of Appellant or his employer, and it had been pointed out to him many times as to what would happen in the event he failed to appear, namely, that judgment probably would be taken against him and that the Company would withdraw from the case. Apparently from the facts we can infer that Nollner did not care what would happen to him or the Appellant and certainly from the facts there should have been a finding that Nollner refused to attend the trial and therefore his absence was inexcusable.

III.

Nollner's Presence Was Necessary at the Trial of the Superior Court Action

As the record shows, this is a case wherein Nollner was the driver of the insured vehicle which was involved in an accident on U. S. Highway 80, west of Phoenix, Arizona, with a vehicle driven by a person referred to as "Height" in the testimony. The facts are that Nollner was traveling in a westerly direction and prior to the collision Height had been traveling in an easterly direction and Height cut across the road in front of Nollner and thereafter the collision resulted. (Plaintiff's Exhibit I-R. 338-339). The record shows that attempts were made on behalf

of Appellant to locate Mr. Height who apparently had made his presence inconspicuous inasmuch as death had resulted from the accident. The record shows there were other witnesses to the accident which may or may not have been favorable to Nollner, who were known to the insurer.

As appears from the record, Mrs. Palmer's counsel, approximately six weeks prior to the trial, threatened Appellant's counsel that he was going to have as a witness the Mr. Height above referred to. (R. 180-181). Thus the insurer was faced with the defense of an action where the only witness to appear on its behalf was Ralph E. Nollner, with the possibility that adverse witnesses would be produced and give damaging testimony. From the facts of the accident set forth in the affidavit for continuance, it will be seen that Nollner was proceeding west and, according to his testimony, the Height truck cut suddenly in front of him, thereby causing the accident. There was the ever present possibility that Height, if present, might well testify to a different set of facts, particularly, he might set forth that he gave a proper hand signal; that Nollner slowed down as though he were going to give Height the right-of-way, and that suddenly Nollner speeded up again, or some other such story as to indicate negligence on the part of Nollner. There was also the ever present possibility that certain statements against interest might be claimed by other witnesses to have been made by Nollner.

Appellee below placed considerable emphasis on the fact that the deposition of Nollner was not taken by Appellant prior to the trial, and Finding of Fact No. 6 sets forth Appellee's contention, showing that a deposition was taken upon stipulation at his request on July 21, 1950. This contention of Appellee overlooks the following: he would have to contend, to sustain that argument, that Appellant knew at all times from the date of July 21, 1950 that Nollner was not going to attend the Superior Court trial. That is not according to the record. Additionally, any

practicing attorney knows that the deposition of a party is never as effective as having the person present, for many reasons. Thus, this argument would indicate that a refusal had been made by Nollner sometime in or prior to July, 1950. Witness the motions for continuance in December and January, and witness the fact that Nollner actually advised Appellant's counsel two days prior to the trial that he would be in Phoenix. It was always the hope and understanding that Nollner would appear at a trial at a future date until the contrary was learned on January 10, 1951. It was not until January that the facts appeared from Attorney Wormwood's statement and from conversations which were learned after the trial showing that there was actually a refusal on the part of Nollner. Therefore, we submit there was never a duty on the part of Appellant to take the deposition of Nollner and it is our further contention that that was not what the policy contemplated when it stated that the assured shall co-operate in giving evidence and attending trials.

The record in the District Court shows that Mr. Romley testified that there were a lot of cases where the only eyewitness, the assured, was not available for the trial and cited where the driver and assured was killed. This, of course, is an excusable absence, although it certainly does handicap the defense of the action, and the Policy, to provide otherwise, would have to obliterate the line between existence on this earth and existence in the hereafter.

Many cases have discussed the necessity of the presence of an assured at the trial of an action. For example, we would like to point out to the court the case of *Fischer v. Western & Southern Indemnity Co.*, 106 S. W. (2d) 490, where the court was talking about an assured who was not an eye witness to the accident but merely the owner of the equipment, and that Court states as follows at page 494:

"Conceding that the assured had not been an eyewitness to the accident, the fact still remains that he was the owner of the truck involved in the accident, the employer of the

driver of it, and the actual defendant in the action. Of course, the garnishee had no way of foretelling what actual need it might have for the counsel and suggestion of the assured during the progress of the trial, but it nevertheless had the right, under the terms of the policy, to insist upon his attendance at the trial so as to have the benefit of his assistance and cooperation in meeting whatever emergencies might arise. Indeed, as was aptly said in *Bauman v. Western & Southern Indemnity Co.*, supra: 'His mere presence as defendant at the trial would have been sufficient to show that he had faith in the defense being made in his name and in his behalf, whereas his absence might, and probably would have, led the jury to infer his lack of faith in, or lack of sympathy with such defense.'

"The assured's material and unexcused lack of co-operation having appeared as a matter of law, and there being no room in the case for any suggestion of fraud or bad faith on the part of the garnishee, it follows that a verdict for the garnishee should have been directed at the close of the entire case."

Further in the case of *Bauman v. Western & Southern Indemnity Co.* 230 M.A. 835, 77 S.W. 2d 496, the facts of which case are similar to the present case and wherein there was a continuance so that the assured could appear and the assured then failed to appear on the continued date and the company attorneys withdrew from the case setting forth the failure to co-operate as a reason for withdrawal in that case, the insured was not an eye witness, yet the court had this to say, at page 501:

"Neither respondent nor any one else could reasonably say in advance of the trial that Baird's absence from the trial would be immaterial, nor can any one now say his absence would have been immaterial. Many things occur during the course of the trial of a contested damage suit which no one can foresee prior thereto. Witnesses sometimes forget facts and sometimes fail to appear; sometimes they give testimony at variance with statements made prior to the trial. Any number of incidents might be mentioned to show the unquestionable importance to the appellant of having Baird himself in court for quick

and ready conference to meet emergencies arising during the trial. Baird himself, although not regarded as a material witness before the trial, may during the trial have become a very important witness in rebuttal with respect to statements made to him by witnesses."

The record shows that one Frank Harmonson, a brother of the plaintiff-Appellee, testified that on the hospital steps shortly after the accident, Nollner stated that he was responsible for the deaths of three of the finest women in the world. At that time it appeared that not only Mrs. Nollner would die, but also his daughter, Mrs. Hillyer, and Mrs. Palmer (R. 184-185). Certainly the presence of Nollner was necessary to refute such an alleged admission or at least to explain what he meant by such statement and not having him available for an incident that actually did take place in the trial showed that Nollner's presence was necessary.

It is submitted that Findings of Fact 13 and 14, stating that his presence was not necessary and his absence was excusable and that the defendant was fully and adequately prepared to present a defense and proceed to trial in his absence, is clearly erroneous. First, as we submitted under division II of the argument, his absence was not excusable and there is no evidence in the record to sustain such finding. Second, we state that the facts set forth above show that the presence of Nollner was necessary to a proper defense of the action.

There are numerous cases in the United States Court of Appeals in various Circuits, setting forth the rule as to the right of the reviewing court to view the evidence to see if the finding is clearly erroneous. We cite the case of *Home Indemnity Company v. Standard Acc. Ins. Co.*, 167 F. 2d 919 at 923, which sets up the defense of when a Finding of Fact is clearly erroneous.

"From the foregoing, it will be seen that the *fact* that White's five statements were made is not disputed. The court found, however, that the appellant 'has not been in anywise prejudiced by an action or statement or omission of George White.' This

is a conclusion of law, or, at most, an inference from undisputed facts, which we are in as good a position to make as was the trial court.

"In *United States v. United States Gypsum Company*, 68 S. Ct. 525, page 541, the Supreme Court, in dealing with a situation comparable to that which confronts us here, said:

" 'Insofar as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52 (a) of the Rules of Civil Procedure (28 U.S.C.A. following section 723c) is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. *A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.* * * *

" 'Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous'." (Emphasis ours)

This Court has the right to and can find from the entire evidence that a mistake has been made and set aside the Findings as clearly erroneous.

IV.

Nollner Breached the Co-operation Clause of the Insurance Policy.

There is set forth in the second paragraph of the Statement of Facts the insured's duties in case of a loss and the paragraph relating to "Action Against Company." Both portions of the insurance contract provide that as a condition precedent to the enforcement of any right by the insured or as a condition precedent to the bringing of any action against the Company, the insured should have fully complied with the terms of the policy which include "3 (c). Assist and Co-Operate with the Company in investigating, securing and giving evidence * * * and by attending hearings and trials." Perhaps the leading case on this subject as to the rule of construction of such a clause is a New York case where the opinion was written by the then Judge Cordoza, which has been cited by nearly every court that has taken up a case of this nature, that is, *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367. In that case, the insurance company insured a drug store under an errors and omissions policy regarding the filling of prescriptions. After suit was filed the secretary of the insured corporation merely stated a mistake had been made and refused to say anything more unless the insurance company would undertake to pay any judgment against him and his corporation. When the attorney for the company refused to enlarge the liability, the secretary announced he would neither sign an answer nor tell anything he knew. Later a request was made by the insurance company for some officer to verify the answer and later for a conference as to the merits, and both requests were ignored. Thereafter the company gave notice and disclaimed liability. Judgment was taken by default and assured was adjudicated a bankrupt. This action was by the plaintiff in the original suit against the insurance company of the drug store. In that case Judge Cordoza stated as follows:

"The question remains whether the conduct of the assured was such a refusal to co-operate as to vitiate the policy. We are satisfied it was. Co-operation does not mean that the assured is to combine with the insurer to present a sham defense. Co-operation does mean that there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense. The attitude of this assured was one of willful and avowed obstruction. It did not deny that it was in a position to give information, material and instructive, in aid of an investigation of the grounds of liability. It affixed to the disclosure of whatever information it had an untenable condition, the assumption by the defendant of an obligation not covered by the contract. The insurer was not required to content itself with an unexplained admission that a mistake had occurred, when, coupled with the admission, there was a refusal to say more except at a price. The cause and occasion of the mistake were facts undisclosed, yet important to be known. The drugs or their containers might have been misbranded by the manufacturer or by some one else. The ingredients might have been harmless. In divers ways, there might be defense to a charge of negligence, or at all events palliation, though mistake were conceded. The default of the assured was more than sluggishness or indifference, phases of thought and conduct that might be the subject of varying inferences when considered by a jury. It was so avowed and purposed that but one inference is possible. If this was co-operation, one is at a loss to imagine when co-operation could be lacking.

"The plaintiff makes the point that the default should be condoned, since there is no evidence that co-operation, however willing, would have defeated the claim for damages or diminished its extent. For all that appears, the insurer would be no better off if the assured had kept its covenant, and made disclosures full and free. The argument misconceives the effect of a refusal. Co-operation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent."

To sum up the holding of this case, which incidentally has been followed by this Honorable Court in the case of *Home Indemnity Company v. Standard Acc. Ins. Co.*, supra, it states that when a condition precedent is breached by the assured, the policy is at an end if the insurer so elects.

This holding was presented by this Honorable Court in the case of *Royal Indemnity Co. v. Morris*, 9 Cir., 37 F. 2d 90, 92, and was cited in the *Home Indemnity Co.* case, supra, as follows:

"In *Royal Indemnity Co. v. Morris*, 9 Cir., 37 F. 2d 90, 92, the late Judge Dietrich said:

" 'Appellee argues that, notwithstanding Gomez, refusal to defend, the insurance company might have protected itself by intervention. But while intervention might have afforded it a measure of protection, clearly in that position it would be at a disadvantage; and besides we are here discussing, not the question whether in spite of Gomez' default the insurance company could have protected itself, but whether he forfeited his rights by violating a material condition of the policy.' (Emphasis supplied)

"Perhaps the leading case on this subject is *Coleman v. New Amsterdam Casualty Co.*, supra, 247 N. Y. 271, 160 N.E. 367 at page 369, 72 A.L.R. 1443."

The Arizona Supreme Court, although not having directly decided a question such as this under the lack of co-operation clause, has in its decisions concerning failure of the insured to perform certain duties under an insurance policy, followed the same rule. The Arizona Court in the case of *Watson, et al, v. Ocean Accident & Guarantee Corporation, Ltd.*, 28 Ariz. 573, 238 P. 338 at page 340, states as follows:

"If the failure to give notice as provided for in the policy is expressly made a ground of forfeiture, of course the plain language of the contract governs, and generally, though not in all jurisdictions, *there can be no recovery when giving of the*

notice, in time and manner as specified in the policy, is made a condition precedent to liability. White v. Home Mut. Ins. Co. 128 Cal. 131, 60 P. 666; Teutonia Ins. Co. v. Johnson et al., 72 Ark. 484, 82 S. W. 840; Davis et al, v. Northwestern Mut. Fire Ass'n, 48 Wash. 50, 92 P. 881, 15 Ann. Cas. 333." (Emphasis supplied)

Later the Arizona Supreme Court in another case on an insurance policy, *Massachusetts Bonding & Ins. Co. v. Arizona Concrete Co.* 47 Ariz. 420, 56 P. 2d 188 at 192, where failure to give notice of the accident was brought forth, stated:

"Bonds of this nature should be construed fairly in accordance with their terms, and we will not rewrite them for the benefit of either party, but neither will we sustain a claim of forfeiture for failure to comply with their conditions subsequent, *unless the contract itself expressly so provides, or it appears affirmatively that such failure has damaged the insurer.*" (Emphasis supplied)

In this last Arizona case, it will be noted that the policy did not provide that failure to give notice was a condition precedent to liability.

In *Berry v. Acacia Mut. Life Ass'n.* 49 Ariz. 413, 67 P. 2d 478 the Arizona Supreme Court discussed the following question:

"When the policy requires that notice be given of a claim of disability before default in the payment of the premium, is such notice within the time prescribed a condition precedent to recovery upon the policy?"

The Court in effect follows the holding of the *Coleman v. New Amsterdam Casualty Co. case*, supra, and states as follows at page 481:

"As to the third question in the very recent case of *Bergholm v. Peoria L. Ins. Co.*, 284 U.S. 489, 52 S. Ct. 230, 76 L. Ed. 416, this precise issue was raised, and the court held, under the

terms of a policy almost identical with the one in the case at bar, that in order to take advantage of the benefits of the policy, proof must be made before the premium was in default—in this case before the 4th day of March. *Contracts of insurance must, of course, be construed according to the terms set forth, therein, when those terms are plain and unambiguous. We think the condition in regard to the necessity of proof as a condition precedent to liability for benefits is clear.* The soundness of life insurance companies depends upon the premium being sufficient in amount and time of payment to meet the actuarial requirements. *These conditions are therefore, of the very essence and substance of the policy, and even a court of equity cannot grant relief for a failure to comply with the explicit and stipulated requirements of the policy setting up a condition precedent to the granting of any relief in the payment according to its strict terms.* Klein v. New York L. Ins. Co., 104 U.S. 88, 26 L. Ed. 622; Bergholm v. Peoria L. Ins. Co., supra. *We hold, therefore, that it was a condition precedent for the plaintiff to give notice and proof of his disability before his premium was in default in order that he could recover for his disability. As a matter of fact, plaintiff does not seriously contend that this is not the law, but he does urge that there is one exception to the rule, which is that when, through some reason for which the policyholder is in nowise to blame, it is impossible for him to make proof within the precise time required by the policy, he is allowed a reasonable time thereafter in which to do so.*" (Emphasis supplied)

Thus the Arizona Supreme Court goes on record as holding that the condition precedent must be complied with before there is any liability under the policy.

The terms of the policies in Arizona cases above set forth did not in any of them provide that the things complained of were a condition precedent, where in this particular case there is the contract that co-operation by the insured is a condition precedent and that no action shall lie against the Company unless as a condition precedent the insured shall have fully complied with all of the terms of the policy.

The New Jersey Court in the case of *Whittle v. Associated Indemnity Corporation*, 130 N.J.L. 576, 33A. 2d 866, ruled in a case where the insured's son and driver disappeared, that the failure to give notice was a condition precedent and that the construction and effect of the contract is a matter of law to be determined by the Court and parallels the holding in the *Home Indemnity Co. of New York v. Standard Acc. Ins. Co.* case, *supra*, that the function of the Court is to enforce a contract as it is written and that if the insured cannot bring himself within the conditions of the policies he is not entitled to recover for the loss.

It is a well-settled rule that the rights of the Plaintiff-Appellee in this case can rise no higher than that of the insured. The New Jersey Court in the *Whittle* case stated as follows:

"The 'construction and effect of a written instrument is a matter of law to be determined by the court and not by the trier of fact.' And in the absence of an infirmity in a contract (none is here alleged) our 'function' is to 'enforce a contract as it is written.' And if the 'insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss.' Cf. *J. C. Ries & Sons, Inc. v. Automobile Insurance Co. of Hartford, Conn.*, 121 N.J.L. 493, 496, 3 A.2 610, 612.
* * *

This same ruling is followed in numerous other cases. Some of the leading cases are *Glens Falls Indemnity Co. v. Keliher*, 88 N. H. 253, 187 A. 473; *Curran v. Connecticut Indemnity Co.*, 127 Conn. 692, 20 A. 2d 87; *Hartford Accident & Indemnity Co. v. Partridge*, *supra*; *Whittle v. Associated Indemnity Corporation*, *supra*. In the case of *Glens Falls Indemnity Co. v. Keliher*, the Supreme Court of New Hampshire stated as follows:

"A breach of condition is no less decisive in its effect than a breach of warranty with reference to which we have recently stated the law as follows: 'It may be taken as still law in New Hampshire that if a fraudulent statement in an application is to be regarded as a warranty, the question of "materiality"

is not one of fact for the jury, but one of law for the court in determining whether the statement is material in the sense that it was intended by the parties to be a part of the contract. This view restricts the question to one of construction of the policy itself.' *Omoskeag Trust Co. v. Prudential Ins. Co.* (N.H.) 185 A. 2, 6. In other words, while the law may disregard trivial and innocent breaches of condition, and while the character of the assured's conduct and the importance of its probable effect upon the interests of the insurer may be considered for the purpose of determining whether there has been a substantial breach, all questions of actual harm and probable effect become immaterial when a breach of condition has been definitely established."

" * * * Since the only obligation of the company to pay the judgment in Mrs. Adams' suit was subject to the conditions of the policy, and since a breach of a material condition has been established, it follows that the obligation of the plaintiff with reference to her judgment is at an end, and the plaintiff is entitled to judgment in this proceeding, in accordance with the first prayer of its petition."

You will note in that particular case the Court holds, which seems to be the majority opinion, that the question of materiality is a question of law for the Court and that all questions of actual harm and probable effect are immaterial when a breach of condition has been definitely established.

In the case of *Curran v. Connecticut Indemnity Co.*, supra, the Supreme Court of Errors of Connecticut held as follows at page 89:

"It is true that the condition of co-operation with an insurer is not broken by a failure of the assured in an immaterial or unsubstantial matter. *Rochon v. Preferred Accident Ins. Co.*, 118 Conn. 190, 198, 171 A. 429; 72 A.L.R. 1455; 98 A.L.R. 1469. In determining whether a condition to co-operate has been broken, we are dealing with contract rights, and if there has been a breach, prejudice need not appear. *Coleman v. New Amsterdam Casualty Co.*, supra. The reason why immaterial

and unsubstantial failures of an assured do not constitute a breach is because they are not included within the fair intentment of the requirement that the assured co-operate, and lack of prejudice to the insurer from such failure is a test which usually determines that a failure is of that nature. Conduct on the part of an assured which makes it impossible for the insurer to get in touch with him in the face of an impending trial, although diligent search is made for him, could rarely, if ever, be regarded as an unsubstantial or immaterial failure to co-operate."

In the case of *Hartford Accident & Indemnity Co. v. Partridge*, *supra*, the assured became intoxicated and did not appear for the trial. The court discusses the same rule of law and states in that regard as follows:

"There can be no question that the condition of the contract of insurance above recited is valid and binding upon both the insured and the complainant below, whose rights are derivative, rising no higher than those of the named insured under the policy contract, she being entitled to recover only 'in the same manner and to the same extent as the insured'.

"In the recent case of *Horton v. Employers' Liability Assurance Corporation Limited*, 179 Tenn. 220, 224, 225, 164 S.W. 2d 1016, 1017, this Court, citing annotations from A.L.R. and other authorities, said:

"The provision of the policy requiring the assistance and cooperation of the insured in the defense of any suit brought by a third party to recover under the policy is valid, in the absence of any statute to the contrary. Annotation, 72 A.L.R. 1448, annotation 98 A.L.R. 1465. The provision is a condition precedent, failure to perform which, in the absence of waiver or estoppel, constitutes a defense to liability on the policy. *Bachhuber v. Boosalis*, 200 Wis. 574, 229 N.W. 117; *Coleman v. New Amsterdam Casualty Co.*, 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 1443. In *Watkins v. Watkins*, 210 Wis. 606, 245 N.W. 695, 698, the court said: "Policies containing covenants the same as or similar to those contained in this policy have been so often sustained that the question

should be considered at rest," and added that "if insurers may not contract for fair treatment and helpful cooperation by the insured, they are practically at the mercy of the participants in an automobile collision." " "

and at page 706:

"While it is held in some cases that a mere showing of absence from the trial does not of itself conclusively establish a breach of the obligation to co-operate, the cases agree that where there is proof of a request for attendance and notice of the time of trial, refusal or failure to attend constitutes a breach and, unless waived, absolves the insurer from liability. This is the substance of the holdings in the cases annotated in 72 A.L.R. pp. 1469 et seq., and 98 A.L.R. pp. 1476 et seq.

"While on the special facts of some cases absence from the trial has been excused, we are cited to no case, and have found none, where, having full notice of the trial and having been requested to attend and having promised to do so, and being in the immediate locality, a defendant eye witness of the accident and party to it, failed to attend and a recovery has been allowed on the policy. Indeed, we have found no case where the 'excuse' relied on was of the character here offered; no case where the absence was the result of intoxication, or of an injury incident thereto."

Noting the last paragraph of the quotation from the Supreme Court of Tennessee, we feel, as the Court did in that case, that the majority of cases unquestionably hold that where the assured had full notice of the trial, was requested to attend and promised to do so and, being able to do so and being an eye witness and a party to the accident, fails to attend, there can be no recovery against the insurance company. We relate back to the fact that we feel Appellee's counsel in answer to the District Judge's question was unable to make a direct answer for the same reason that had he been representing Appellant, he could have done no more than was done by Appellant or Appellant's counsel in this case and that he would have done the same as was done by Appellant and Appellant's counsel.

The Court of Errors and Appeals of New Jersey in the case of *Whittle v. Associated Indemnity Corporation*, supra, restated this rule, that when a condition precedent of the policy is unfulfilled, the insurer may terminate the liability under the policy for a failure to fulfill the condition.

"And if the test were that it must be shown that the failure to fulfill the conditions precedent prejudiced the insurer, the trial judge might well have been justified, under the proofs, in submitting the case to the jury. But that is not the test. The test is: Was a condition precedent of the policy unfulfilled by the assured? If it was then, if the insurer so chooses and it did so choose, the policy is at an end (cf. *Kinder-vater v. Motorists Casualty Ins. Co.*, supra, 120 N.J.L. at page 376 et seq., 199 A. at pages 608,609), for 'there has been a failure to fulfill a condition upon which (insurer's) obligation is dependent.' *Coleman v. New Amsterdam Casualty Co.*, 247 N.Y. 271, 160 N.E. 367, 369, 72 A.L.R. 1443."

Appellant respectfully submits to this Court that the evidence conclusively shows that Nollner breached the co-operation clause of the policy, that the Appellee did not show that all of the terms of the policy had been fully complied with and that such a showing was a condition precedent to action against the company, and that Nollner's inexcusable failure to attend the trial was such a breach that there can be no recovery in this action against the appellant.

V.

Appellant Did Not Waive Nollner's Failure to Appear

As soon as it was finally determined that Nollner would not appear for the trial and that a continuance was not going to be granted and was refused by the Superior Court, Appellant immediately withdrew from the case. Appellee contended below apparently that his offer that the trial be continued three or four days which was not accepted by Appellant, indicates that there

was a desire to terminate and disclaim. At the time these statements were made, the motion for withdrawal of counsel was being argued. The Court had previously overruled the motion for continuance. The testimony is as follows: (Defendants Exhibit 22, R. 125-127)

"Mr. Romley: Mr. Linton, I believe you were in communication with Mr. Nollner by long distance telephone on Tuesday of this week, January the 9th, at which time you advised him that the cause would be reached for trial on the morning of January the 11th, is that correct?

"Mr. Linton: That is true.

"Mr. Romley: At that time the defendant informed you that he intended to appear and testify in the trial?

"Mr. Linton: He told me at that time that plane reservations were made, and he expected to be here, but if he changed his mind he would advise me the following day, which he did.

"Mr. Romley: Then you on that day, January the 9th, caused to be issued two or three subpoenas for witnesses to appear at the trial, did you not?

"Mr. Linton: Yes, there were subpoenas issued, preparation made for the trial on behalf of the defendant.

"Mr. Romley: And full preparation was made for the trial except for a final conference with the defendant?

"Mr. Linton: That is right.

"Mr. Romley: And were the defendant present right now, you would proceed with the trial, would you not?

"Mr. Linton: Should the defendant appear, I probably would be in a position to represent him. I would have to have a short continuance since he has said he wouldn't appear and, of course, my trial preparations have been laid aside.

"Mr. Romley: Your trial preparations have been completed, though?

"Mr. Linton: It is a hard question to answer. I don't know whether it is or not.

"Mr. Romley: Do you now wish a slight continuance of three or four days?

"Mr. Linton: I have made my application for continuance. It has been denied. I don't think I have any right to go any further and overrule the Court's orders.

"Mr. Romley: That is all.

"The Court: Mr. Linton, I feel that this case has been postponed at least once, and perhaps in disregard of the statute. The statute, apparently, in mandatory language uses the word 'shall.' As far as the continuance is concerned, I feel that the plaintiff has a right to have his cause heard." (R. 125-127)

The review of Defendant's Exhibit 22 leading up to the testimony cited, shows that the continuance had been denied by the Court and that Appellant's attorney was arguing his motion for leave to withdraw. These questions were asked by Appellee's attorney of Appellant's attorney. The Court in its remarks indicated that the postponement had been in disregard of the statute and we submit that the offer of continuance was not for the purpose of allowing Appellant to attempt to have Nollner present but for the purpose of forcing Appellant to trial without Nollner with the offer of a three or four day continuance. These facts are somewhat summarized in Finding of Fact No. 9 and we believe that our conclusion is sound, inasmuch as the proposed Finding of Fact offered by Plaintiff (R. 23) contained Finding of Fact No. 9, which stated that Defendants' counsel had offered to stipulate: "(2) That the trial be continued for three or four days to enable Nollner to be present." This was objected to by Appellant in paragraph 7 of Objections, and the Findings as fin-

ally adopted by the Court deleted the words "to enable Nollner to be present."

The Supreme Judicial Court of Massachusetts in *Goldstein v. Bernstein et al* 315 Mass. 329, 52 N.E. 2d 559, ruled on a question closely allied. In that case the attorney for the company secured a continuance to March 1 so the assured could make a trip to Florida and the assured advised she could not return to New York on the date the trial was set but would be one day late and demand was made that she be there on time. When the trial was reached, the assured not being present, the counsel withdrew. The court stated in that case as follows at page 562:

"The insurance company was acting in good faith and was justified in disclaiming liability. The judge properly excluded evidence that counsel for one of the plaintiffs would have been willing to grant a continuance when the case was reached for trial if requested to do so by the attorneys for the insured. The record shows that counsel for another plaintiff requested that the judge assess damages following the default of the insured. The company was not required to request or to assent to a continuance when the insured failed to appear. Such conduct might have later subjected it to a claim of waiver or estoppel. See *Goldberg v. Preferred Accident Ins. Co.*, 279 Mass. 393, 399, 181 N. E. 235."

Furthermore, it appears rather definitely that there was no question but that Nollner would not ever come to a trial at any time unless it suited his convenience and his convenience had not been suited for the past four trial settings and it would appear that it would be absurd to state to the Court that a continuance was wanted for that purpose when it was obvious that Nollner never had had any intention at all of appearing at the trial of the case. In Finding of Fact No. 9 in which it is stated that "1. That Nollner if present at the trial would testify that the facts were as recited in the affidavit of counsel," this was another offered stipulation. In this regard, we should like to point out that *Section 21-802 A.C.A. 1939*, requires this identical offer on the

part of a party contesting a motion for continuance and the statute further provides that if the party makes the offer that the facts set forth in the affidavit would be testified to by the party or witness that the continuance shall be denied. Therefore such an offer after denial of motion for continuance is certainly immaterial.

The third item of Finding of Fact No. 9 offered on the part of Plaintiff's counsel is "3. That a jury be waived and the cause tried to the court." The trial to a jury under the circumstances would have been considerably more prejudicial than a trial before the court; nevertheless, there was the breach of the condition precedent in the policy which required Nollner's attendance whether the case be tried before the court or a jury. We cannot overlook that the Court decides a case on the same facts as a jury, and without Nollner present to state his case, or refute or explain testimony of witnesses that might be produced or were produced, is, to say the least, a handicap which Appellant contends was actually an unsurmountable handicap. As was stated by the Massachusetts Court in *Goldberg v. Preferred Acc. Ins. Co. of New York*, 279 Mass. 393, 181 N. E. 235, at pages 237 and 238:

"The attorney who was to try the case was justified in feeling that an interview with Costa was indispensable to proper preparation for trial, and that his presence and assistance in court at the trial were essential to the defense. A refusal on Costa's part, due to personal reasons not material to the defense of these cases, would constitute lack of co-operation. *Coleman v. New Amsterdam Casualty Co.*, 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 1443."

As is well known by all who try contested litigation, the lack of a material witness, whether a party or merely a witness, is a severe handicap and many times will result in loss of the case rather than a successful action.

On cross-examination, Appellant's counsel testified as follows in the District Court:

"A. We were negotiating there, Mr. Romley, on that point. I still wish he had been there. I think we would have done all right.

"Q. You think you would have won, do you?

A. If he had been here personally I think we would have had an excellent chance.

Q. Do you think you would have won if you had proceeded to trial that day in his absence?

A. No."

(R. 167)

We think there is no dispute on this in the record, for certainly Mr. Romley never testified that we would have won the case if we had proceeded to trial in Mr. Nollner's absence and he gave no opinion in his testimony that our defense was good without Nollner present. We almost feel that it is a matter of judicial notice that the absence of a material eyewitness who is a party results in prejudice to the insurer.

The same points above mentioned would go to counsel's offer No. 4 in Finding of Fact No. 9, to the effect that his deposition be received in evidence without objection. This, of course, again is when he was arguing against withdrawal of Appellant's attorney from the case and for the same reasons above set forth, the deposition would be of no more help than the affidavit attached to the motion for continuance since it had none of the elements necessary of cooperation or assistance of a material witness in helping to explain or rebut adverse testimony. To show the great benefit of Nollner's deposition, we merely refer to Findings of Fact Nos. 10 and 11, which show during the course of the default trial Nollner's deposition was offered and received in evidence and Plaintiff received a judgment in the amount of

\$27,500. Therefore, what was the benefit of offer No. 4? We feel that this substantially helped the testimony of the writer set forth above, that the case could not have been won without Nollner present personally, whereas the facts of the accident, as set forth in the motion for continuance, certainly show there was a legitimate defense. (Plaintiff's Exhibit I, R. 338-339).

Appellant feels that the Court below erred in Finding of Fact No. 12. The only evidence to support that Finding of Fact is that an offer of settlement was made after the motion for continuance had been denied and before the motion for leave to withdraw had been heard by the court and *not after trial* of the Superior Court action. The examination of the record concerning the settlement conclusively shows that any settlement negotiation was not made after the trial of the case. In this we refer to Mr. Romley's testimony on pages 312, 313 and 314 of the Transcript of Record. All of Mr. Romley's testimony shows that the negotiations were prior to the trial. It is difficult for the writer to remember the exact time settlement negotiations were discussed, as those things are sometimes casually and sometimes purposely discussed. We think, however, Plaintiff's Exhibit E - R, 317, 318, 319, which was a letter from Appellant's office to Appellant's counsel, the writer, in this portion explains the offer of settlement.

"We know that you will prepare a complete report for our file covering in detail the event leading up to this latest development and that our Denver counsel will likewise give us complete information for the record in event of a subsequent garnishment action against the company for failure to pay such a judgment as may be obtained by the plaintiff in this case.

"It was likewise agreed that we would still authorize settlement up to a maximum of \$3,000 *under the circumstances* if the plaintiff's attorney was desirous of accepting this amount." (R. 318) (Emphasis ours)

This is at least the authority of the writer toward a settlement negotiation, which was not exceeded. That is that after the motion for continuance was denied we were *still* authorized to settle up to \$3,000 *under the circumstances* if the plaintiff's attorney was desirous of accepting that amount. What has happened since the judgment was rendered by the Superior Court shows there was consideration for an offer to dispose of any liability on the part of the Company. It is the contention of Appellant that any offer of settlement at that time was made for the purpose, not of extinguishing the liability of Nollner under the policy as to Mrs. Palmer's cause of action, but to extinguish the possibility of a garnishment action or, as in this case, a direct action, and appeal to this Honorable Court. The letter of authority above referred to states that the Company would still authorize under the circumstances which must mean the circumstances then existing, a maximum of \$3,000. This offer was before judgment, which would further indicate that the Company, as well as the Company's counsel, was of the opinion that a judgment would be granted Appellee without Nollner's presence, even though his deposition were there and even though the case was tried to the court and even though the affidavit was read into the record by the Court.

We feel that the District Court erred in the last portion of Finding of Fact No. 12, for certainly that is not material to show a waiver on behalf of the Appellant. Testimony concerning the discussion of appeal or motion for new trial appears in the record as Plaintiff's Exhibits F and G, (R. 321-325.) It shows that this writer discussed whether or not *under a strict reservation of rights* there should be a motion for new trial filed and an appeal from the judgment or whether we should allow garnishment proceedings to be filed. It was our statement at that time that we felt very little would be gained by an appeal and the Company felt that it should do nothing but allow garnishment proceedings to be filed by Plaintiff's attorney. (Plaintiff's Exhibit F, page 321). Certainly discussing what might be done after

judgment under a reservation of rights is a long cry from any waiver or estoppel.

The Honorable District Court erred in inserting this phrase in one of its Findings of Fact, without setting forth additionally that these actions were considered only under a strict reservation of rights. These were communications between attorney and client concerning the discussion of procedure after a denial of liability under the policy.

The Supreme Court of Pennsylvania, in *Cameron v. Berger*, 336 Pa. 229, 7 A. 2d 293, stated as follows:

"Plaintiffs insist, however, that the offers of settlement made by the garnishee's agent, and certain statements attributed to them, indicate that Mrs. Berger's absence was not injurious, because she had no material evidence to offer, and no valid defense to the charge of negligence. The record does not establish such a complete absence of a defense, and the fact that a settlement was discussed would not, in itself, be conclusive of the merits of the respective claims. Furthermore, even if the insured's liability were clear, the garnishee was prejudiced by her failure to contest the important issue of the amount of damages to be awarded. This the garnishee could not have done except by its full assumption of the defense of the case, which would have jeopardized its right to avail itself of defendant's breach of the insurance contract. See *Malley v. American Indemnity Corp.*, 297 Pa. 216, 146 A. 571, 81 A.L.R. 1322; *Graham v. United States Fidelity & Guaranty Co.*, 308 Pa. 534, 162 A. 902; *Moses v. Ferrel & Indemnity Co. of America*, 97 Pa. Super. 13."

We have discussed the above argument as though it actually made some difference as to whether or not a successful defense could have been maintained in the absence of Nollner or whether or not his appearance was absolutely necessary. This Honorable Court in the case of *Home Indemnity Company vs. Standard Acc. Ins. Co.*, *supra*, stated as follows at page 925:

"In its brief, Standard asks the following rhetorical question: "Would its (the appellant's) opportunity to investigate and dispose of the claims have been better if White had told a representative of appellant the first time he talked to him that he may have fallen asleep and the accident may have occurred at that time, although he knew none of the facts of the accident?" "

and at page 928:

"In *Seltzer v. Indemnity Ins. Co.*, supra, 252 N.Y. 330, 169 N.E. at page 404, the court said:

" 'The testimony of Wasserman, if given according to his affidavit, was at least material on the trial of the negligence cases. It might have helped the defendant and the insurance company, and again it might not have been of any avail. This, however, is not the point. The insurance company was entitled to the defendant's assistance and to a truthful statement of the cause of the accident.' "

VI.

Nollner's Failure to Attend the Trial Was a Material Breach of the Policy and the Appellant Was Prejudiced by Such Breach

Under this heading comes the subject of whether or not the failure of Nollner to appear and attend the trial was material. No argument is particularly necessary on this subject if the holding in the case of *Coleman v. New Amsterdam Casualty Co.*, supra, is followed. A review of the cases on this matter reveal the following findings basically. Where the insured failed to notify the company of the accident and the notification was made a few days later, then the breach was not considered material since there was no prejudice to the company. In a majority of all the cases where the failure to cooperate or the failure to give notice existed up to the time the company withdrew and was not cured, it has been held that the breach was material and either that

there was prejudice found as a matter of law or that no prejudice need be shown. A case on this subject is the case of *Bauman v. Western & Southern Indemnity Co.*, 230 M.A. 835, 77 S. W. 2d 496, and in that case the Court stated concerning the assured's failure to attend the trial as follows, at page 501:

"We are of the opinion that the failure of Baird, the assured in the case at bar, to appear in court for the trial very materially prejudiced and handicapped appellant in its efforts to defend the damage suit brought against him, and constituted a clear breach of the condition of the policy which required him to co-operate with appellant in such defense, warranting appellant in withdrawing from the case."

A good statement of the rule is set forth by the Supreme Court of New Hampshire in *Glens Falls Indemnity Co. v. Keliher*, supra. The Supreme Court of Illinois in *Schneider v. Autoist Mut. Ins. Co.*, 346 Ill. 137, 178 N. E. 466, stated as follows at page 467:

"* * * The condition of the policy requiring co-operation on the part of the assured in the defense of the action brought against him by the injured party is one of great importance. Without the presence of the assured and his aid in preparing the case for trial, the insurance company is handicapped, and such lack of co-operation must result in making the action incapable of defense. The action of Allen in refusing to go to New York on the trial of the case there prevented the insurance company from making any defense. Obviously he could not recover in a suit on the policy, and neither can the plaintiff here."

In the case of *Bauman v. Western & Southern Indemnity Co.*, supra, the Court stated at page 503 as follows:

"In view of the evidence in this case and the plain and unambiguous language of the co-operation clause of the policy, we believe it is not within the power of any one standing in Baird's shoes, nor is it within the power of the court, to say that Baird's absence from the court at the trial was immaterial.

We are of the opinion that the trial court erred in rendering judgment for respondent on this record. The judgment is therefore reversed."

In the case of *Cameron v. Berger*, supra, the assured disappeared from her home to avoid arrest and was not present at the trial and the company finally addressed letters disclaiming responsibility under the co-operation clause. The Court held that this lack of co-operation was a matter of law, since it was a material breach. The court in that case stated:

"We are not unmindful of the rule that where an insurer seeks to avoid liability for lack of co-operation, the question whether there has been a material breach of the condition is ordinarily for the jury. *Bachman v. Monte*, supra (326 Pa. page 297, 192 A. 485). Here, however, the evidence of the failure of the insured to co-operate conclusively appeared, and the trial court should, *as a matter of law*, have directed judgment for the garnishee in both cases. See *Zenner v. Goetz*, 324 Pa. 432, 438, 188 A. 124." (Emphasis Supplied)

This holding also appears in the case of *Fischer v. Western & Southern Indemnity Co.*, supra, and the Court held in that case that the assured's material and inexcusable lack of co-operation appeared as a matter of law. The same ruling was followed in the case of *Whittle v. Associated Indemnity Corporation*, supra.

It would appear from these cases that failure of the assured to attend the trial under the circumstances of this case was a breach of a material condition and we feel that the evidence shows as a matter of law that there was substantial prejudice to the appellant. In the case of *Cameron v. Berger*, supra, the Court stated as follows:

" * * * The co-operation clause unquestionably constituted a material condition of the policy, and from the record it clearly appears that it was breached by Mrs. Berger in such manner as to forfeit her rights against the company.

"It is true, as plaintiffs contend, that the garnishee had the burden of proving, not merely a breach of this condition, but that the breach was such as to result in 'substantial prejudice and injury to its position'. *Conroy v. Commercial Casualty Ins. Co.*, 292 Pa. 219, 224, 140 A. 905, 907; and see *McClellan v. Madonti*, 313 Pa. 515, 169 A. 760; *Bachman v. Monte*, 326 Pa. 289, 192 A. 485. There can be no doubt here that defendant's failure to co-operate was both prejudicial and injurious to the garnishee."

Also see *Hutt v. Travelers' Ins. Co.*, 110 N. J. 57, 164 A. 12 (N.J.)

This matter was ably discussed by this Court in the case of *Home Indemnity Company vs. Standard Accident Ins. Co.* supra, where the court found that it was undisputed that White made five different statements as to how the accident occurred and the lower court found that the company had not been in any way prejudiced by those statements or omissions and this Court held that that was a conclusion of law or, at most, an inference from undisputed facts, which the reviewing court was in as good a position to make as was the trial court. We feel that the same rule follows from the assured's failure to attend the trial. This Honorable Court in the case of *Home Indemnity Company vs. Standard Acc. Ins. Co.*, supra, made this statement:

"We do not believe that any practicing attorney in any state, confronted with these four various versions on the part of his client, would consider that the latter was 'co-operating'!"

Likewise, we do not believe any practicing attorney in any state would consider that his client was cooperating if he refused to attend the trial and we think that whether there was insurance or otherwise, an attorney under those facts would attempt to withdraw, if possible. In our opinion, the statements of this Court in *Home Indemnity Company v. Standard Acc. Ins. Co.*, supra, at page 929, are pertinent and we adopt those statements as the law which should be applied in this case.

"In our opinion, the law governing conditions precedent in insurance contracts is correctly stated in *Whittle v. Associated Indemnity Corporation*, 130 N.J.L. 576, 33 A. 2d 866, 868, 869, in which there was considered a policy having a clause in identically the same language as that quoted above. There the Court of Errors and Appeals said:

"These conditions are not, as urged, conditions subsequent. * * * In the case at bar the stated conditions by the very terms of the policy (Condition 10) are made conditions precedent. * * * Moreover, we have held that they are "conditions in the nature of a promissory warranty," and that they are "conditions precedent to the right of recovery."

* * * * *

"And if the test were that it must be shown that the failure to fulfill the conditions precedent prejudiced the insurer, the trial judge might well have been justified, under the proofs, in submitting the case to the jury. But that is not the test. The test is: Was a condition precedent of the policy unfulfilled by the assured? If it was then, if the insurer so chooses and it did so choose, the policy is at an end * * *, for "there has been a failure to fulfill a condition upon which insurer's obligation is dependent." *Coleman v. New Amsterdam Casualty Co.* (Supra).

"The "construction and effect of a written instrument is a matter of law to be determined by the court and not by the trier of fact." And in the absence of an infirmity in a contract (none is here alleged) our "function" is to "enforce a contract as it is written." And if the "insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss." * * * In short, the law does not make a better contract for the parties than they chose to make for themselves. (Case cited)'

"In the instant case, the 'insured cannot bring himself within the conditions of the policy'. Accordingly, we hold that 'no action shall lie against the company'."

In a more recent case arising out of this Circuit, namely, *Standard Accident Insurance Company v. Winget*, 197 F. 2d 97, this Court was following the rule set forth in the *Home Indemnity case*, and made the observation we made at the beginning of this heading of the argument, to the effect that in every one of the cases in which non-co-operation was found, the Court was convinced that the concealment, because of its nature or the long duration of time for which it was maintained, was of such character that the Court could, as a matter of law infer harm to the Company.

The Supreme Court of California, in the very well reasoned opinion of *Valladao, et al, v. Fireman's Fund Indemnity Co.*, 13 Cal. 2nd 322, 89 P. 2d 643, considered very definitely the question of whether or not prejudice was essential to the assured's defense and if under certain facts, as a matter of law, prejudice could be presumed. In this case, the California court discussed the *Coleman v. New Amsterdam Casualty Co.* case, *supra*, the *Hynding v. Home Accident Ins. Co.*, 214 Cal. 743, 7 P. 2d 999, as well as the case of *Purefoy v. Pacific Automobile Indemnity Exchange*, 5 Cal. 2d 81, 53 P. 2d 155. The Court in the *Valladao* opinion states that in the *Hynding* case it was not necessary to the disposition of the *Hynding* case that that point be decided. The Court also stated that it declined to make a determination of whether the insurer must make a showing of prejudice and paralleled its decision with the decision in the *Purefoy* case, *supra*. The Court further stated that there was an absence of unanimity as to whether or not the insurer was required to make a showing of prejudice from breach of the co-operation clause in order to relieve itself from liability and cited the *Coleman* case, *supra*, to the effect that prejudice need not be shown.

In discussing the *Purefoy* case, *supra*, the Court pointed out that prejudice was presumed from the failure of the assured to notify the Company of the accident for a year and three months although it learned of the accident three and a half months after-

wards from the injured parties, inasmuch as such conduct precluded prompt investigation of the accident, and stated that the insurer was entitled to rely on a substantial breach of so material a condition of its policy. The Court states as follows:

"So it is in the present case, we are satisfied from an examination of the record that as a matter of law prejudice must be presumed (if prejudice be essential to the insurer's defense) from the substantial and wilful breach by the assured of the material co-operation clause of the policy."

In this respect, we should like to point out that *Section 61-330, A.C.A. 1939*, under the statute relating to insurance contracts, states as follows:

"Every contract of insurance shall be construed according to the terms and conditions of the policy * * *"

Thus, it is the contention of Appellant that inasmuch as there was a condition precedent to recovery and that condition was co-operation on behalf of the insured, if the rule adopted by this Court is to the effect that prejudice must be shown, we feel that the facts of this case do show prejudice from a breach of the material co-operation clause.

In the event the Court should follow the ruling of the *Coleman* case, *supra*, we feel that great weight is given to this holding by virtue of the Arizona statute and Arizona cases previously decided.

Conclusion.

In conclusion, we respectfully submit that the District Court made the errors set forth in our Specifications of Error and that the minute entry order of October 22, 1953 by the Court, ordering judgment for the Defendant was proper, and that this judgment

should be vacated and reversed with directions to enter judgment for the Defendant as prayed.

Respectfully submitted:

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No. 14560

IN THE

United States Court of Appeals

For The Ninth Circuit

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY, a corporation,
Appellant,

vs.

AUDRA H. PALMER,
Appellee.

Appeal from the United
States District Court for
the District of Arizona

BRIEF OF APPELLEE

MOORE & ROMLEY

Attorneys for Appellee

FILE

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No. 14560

IN THE

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For The Ninth Circuit

STATE FARM MUTUAL
AUTOMOBILE INSURANCE

COMPANY, a corporation,

Appellant,

vs.

Appeal from the United
States District Court for
the District of Arizona

AUDRA H. PALMER,

Appellee.

Preliminary Statement

For brevity and convenience we will refer to the parties as they appeared in the trial court: Appellee as "plaintiff", and Appellant as "defendant". The transcript of record will be referred to as "Tr.", and the brief of Appellant as "B.A.".

STATEMENT OF THE CASE

On appeal the evidence must be viewed most favorably to the judgment, findings of fact and conclusions of law made and entered by the trial court. *Kansas City Stock Yards Co. of Maine vs. Anderson* (C.A. 8), 119 Fed.(2d) 91. Appellant's Statement of the Case is most favorable to appellant. In keeping with the rule just mentioned, appellee will make a new statement.

Undisputed Facts

The following facts are not disputed:

On January 17, 1948 Ralph E. Nollner was driving his 1946 Studebaker Sedan with his wife, Mrs. Nollner, his daughter, Mrs. Hillyer, and the plaintiff, Mrs. Palmer, riding therein as passengers. An accident occurred as a result of which Mrs. Nollner was killed and Mrs. Hillyer and Mrs. Palmer sustained serious injuries.

At the time of the accident Nollner was insured against liability by defendant; he gave due notice of the accident to defendant.

Plaintiff commenced an action in the Superior Court of Maricopa County, Arizona against Nollner for the injuries she sustained. Counsel for defendant represented Nollner in that action. On March 31, 1950 he took the deposition of Mrs. Hillyer, and on May 2, 1950 he took the deposition of plaintiff. Accordingly, defendant was fully advised as to the contentions of the passengers in Nollner's automobile, both with respect to the collision and how it occurred and with respect to any admissions which Nollner may have made to them.

Defendant made no effort to take Nollner's deposition. Upon stipulation and at plaintiff's request his deposition was taken on July 21, 1950 in Denver, Colorado, where Nollner resided. In his deposition Nollner testified fully and freely and favorably to the defendant, in the presence of counsel for both parties, as to the collision and how it occurred. He expressly denied that he had admitted to anyone that he was at fault or to blame for the collision.

After several continuances the Superior Court action was set for trial on January 11, 1951. On January 10, defendant's counsel received a telegram from Nollner reading as follows:

"Regret inability to leave Denver today as originally planned. Two of field men ill, one in hospital for operation and I would jeopardize my position by leaving. Hope postponement can be arranged."

Upon receiving this telegram defendant's counsel filed a motion for continuance supported by his affidavit reciting the substance

of the telegram. The affidavit also recited in detail Nollner's version of how the accident occurred as related in his deposition, and that Nollner would so testify if present in court.

On January 11, 1951, the motion for continuance was denied. Defendant's counsel then asked leave of court to withdraw as counsel for Nollner. In resisting this request plaintiff offered the following stipulations: that Nollner, if present at the trial, would testify to the facts as recited in the affidavit of defendant's counsel; that the trial be continued for three or four days; that a jury be waived and the cause tried to the court; and that Nollner's deposition be received in evidence without objection. All of these proffered stipulations were refused.

The leave requested was granted and defendant's counsel withdrew as counsel for Nollner. Upon motion of the plaintiff the jury was discharged and the cause tried to the court. During the course of the trial Nollner's deposition was offered and received in evidence. On January 18, 1951 judgment was entered in Superior Court in favor of plaintiff and against Nollner in the amount of \$27,500.00. That judgment is now final.

Execution on the judgment was returned unsatisfied. Plaintiff demanded payment from defendant, and upon defendant's refusal this action was commenced.

Defendant states that evidence of the failure of Nollner to attend other trial dates in the Superior Court action "is immaterial since the trial was held on January 11, 1951". (B.A. 10) But defendant itself dwells upon this evidence at some length. (B.A. 4-6)

Facts Proven By Evidence In that connection the evidence disclosed as follows:

Early in February, 1950 the Superior Court action was first set for trial on June 6, 1950. (Tr. 134-136) Yet defendant did not notify Nollner of this trial setting until May 9, 1950. (Tr. 133-136, 263) On May 10, 1950 defendant's claims manager in Berkeley, California wrote a letter to defendant's claims manager for Colorado in which he stated (Tr. 139):

"We would appreciate your advising your Denver office to be alerted for a request from Mr. Linton to the policyholder to proceed to Phoenix, Arizona, for purposes of allowing the plaintiff's attorneys to take his deposition. At such time as this request is made, it will be necessary for the Denver office to assist the assured with a travel advance and to make certain that Mr. Nollner does proceed to Phoenix as requested. A complete refusal on his part would be definite indications of lack of cooperation, and the matter of actually extending a defense to the lawsuits, if trial materializes, would then be given serious consideration by this office."

On May 17, 1950 defendant's counsel communicated with Nollner for the first time. (Tr. 135).

He wrote a letter in which he asked that Nollner be in Phoenix on May 22nd or 23rd for a deposition and then return on May 31, shortly before the trial of another Superior Court action pending against him by Mrs. Hillyer. (Tr. 64) On May 23, defendant's Denver counsel took a court reporter's statement from Nollner wherein Nollner stated that he was Public Relations Director for the Salvation Army, that he was in charge of and agreed to conduct fund raising campaigns, that on March 29, before he was notified of the trial, a proposal was submitted to the Denver Community Chest for the raising of funds for the Salvation Army Training College, that the Salvation Army was given until June 1 to raise the money, that between June 1st and June 15th a similar campaign had to be conducted in Salt Lake City, that still another campaign had to be completed in Colorado Springs by July 1st, that he could not possibly get away before July 1 without resigning his position, that after July 1 he would be in position to go to Phoenix if the cases could be continued, that until then he had to devote his full time to the campaigns because no one could take his place, and that he might be able to get away for one day on May 29th or 30th for the deposition. (Tr. 69-78) When pressed by defendant's counsel for a refusal, Nollner stated (Tr. 75):

"It isn't a question of refusing to go. It's a question which I have to decide which is more important to me. I have to make a living, and I have to decide whether that is more im-

portant or going to the trial and going out and finding something else to do. My living is more important, and I have to make that decision, myself."

Upon receipt of the court reporter's statement, counsel for defendant filed a motion for continuance which was argued on May 27, 1950 and at that time the trial was postponed to July 13, 1950. (Tr. 80-81) On July 3, defendant's counsel wrote Nollner advising him of the July 13 trial setting and asking that he be in Phoenix on July 10. (Tr. 85) While this letter indicates there had been a prior conversation between defendant's counsel and Nollner the evidence did not disclose when that conversation took place, that is, whether it was on July 1, July 2, or earlier.

On July 7 defendant's Phoenix counsel received a telephone call from Nollner who stated that he would not be able to come to Phoenix for a trial on July 13 because he was carrying on a campaign for the Salvation Army and would jeopardize his job by leaving. (Tr. 88-92) On July 8 defendant's counsel received a telegram from Nollner reading as follows (Tr. 89):

"Regret inadvisable leave Denver next week for Palmer trial. As it would jeopardize my position which I can not afford to lose. Hope trial can be postponed. Letter follows."

On the same day, July 8, 1950, Nollner wrote a letter to his daughter, Mrs. Hillyer, in which he said (Tr. 278-279):

"It seems as though I will not see you this week. Talked with Mr. Linton over long distance yesterday and also with lawyer here Friday and we are hoping matter will be settled out of court (say nothing about it to anyone). Anyway it was finally decided by all parties, lawyers and insurance men, that I can not afford to jeopardize my work and my job and whatever happens I must stay here at present for I can not possibly spend a week away at this time. Attorney here has talked with members of advisory board and he knows the situation. No one to carry on so I will just have to be here."

On July 12 defendant's counsel filed a motion for continuance (Tr. 90) which was heard on the same day, and at that time the case was set for trial on September 25, 1950. (Tr. 95)

Up to the time of this continuance there had been no refusal

on the part of Nollner to attend trial. He had requested postponements for business reasons and defendant's counsel felt obliged to move therefor. (Tr. 145, 150, 154, 155)

The last motion for continuance, however, was made with the hope that it would be denied so that defendant's counsel could withdraw from the case for lack of cooperation. (Tr. 156-158)

On July 13 defendant's counsel sent both a letter and a telegram to Nollner advising him that the case had been continued to September 25, 1950. (Tr. 98) Pursuant to these communications Nollner made arrangements for a vacation in order for him to be present at the trial at that time. (Tr. 109) On September 9 defendant's counsel again wrote Nollner that the court to whom the case had been assigned could not hear the same on September 25 and had therefore reset it for December 19, 1950. (Tr. 100-101) By the time Nollner received this letter it was too late to change his vacation period. (Tr. 107) Thereafter Nollner sent a telegram to defendant's counsel wherein he stated (Tr. 106):

"Impossible for me to be present 19th as Christmas welfare load Salvation Army requires all personnel here. Letter follows about later date. Regards."

His telegram was followed by a letter wherein he advised defendant's counsel that the Salvation Army had an unusually heavy welfare load for Christmas which required everyone in his office to work day and night and for this reason he could not leave at that time. (Tr. 107-108) Pursuant to this advice defendant's counsel on December 17 filed a motion for continuance which was granted and the trial postponed to January 11, 1951. (Tr. 109) On December 22, 1950 defendant's counsel wrote Nollner advising him of the postponement. (Tr. 111-112)

On January 9, 1951 Nollner made reservations to fly to Phoenix on January 10. (Tr. 113-114, 266) On January 10 he wired defendant's counsel as follows (Tr. 116):

"Regret inability to leave Denver today as originally planned. Two of field men ill one in hospital for operation and I would jeopardize my position by leaving. Hope postpone-ment can be arranged."

Pursuant to this telegram defendant's counsel on January 10 filed a motion for continuance. (Tr. 114-115) The telegram was read to the court. (Tr. 187) Attached to the motion was an affidavit by defendant's counsel that if Nollner were present he would testify to the facts therein contained; these facts were much the same as testified to by Nollner in his deposition and were favorable to defendant. (Tr. 338-339) In order to prevent further delay plaintiff offered to stipulate that Nollner if present would testify to the effect recited in the affidavit of defendant's counsel. The offered stipulation was refused. (Tr. 120-121, 189) Thereupon the motion for continuance was denied and the court advised counsel for both parties that the case would again be taken up at 1:30 the next day, January 11. (Tr. 121)

On January 11 defendant's counsel filed a motion to withdraw as counsel for Nollner. The motion was heard at 1:30 on January 11. (Tr. 117-130) Immediately prior to the hearing, counsel for defendant renewed an offer to settle the case for \$3,000.00. (Tr. 164, 314) At the hearing plaintiff offered to stipulate that when the case proceeded to trial counsel for Nollner could offer Nollner's deposition in evidence without objection. (Tr. 122) Plaintiff also offered to stipulate that the jury be discharged and the case tried to the court. (Tr. 123) Counsel for defendant, who was still counsel of record for Nollner, refused the stipulations. (Tr. 123, 185) He acknowledged that he had made full preparation for the trial in Superior Court except for a final conference with Nollner. (Tr. 126, 191) He further stated that if Nollner should appear he would have to have a short continuance since his trial preparations had been laid aside. Plaintiff's counsel then offered to stipulate to a continuance of three or four days to enable counsel for defendant further time to contact Nollner and see if he could be present. (Tr. 126, 187-189, 195) The stipulation was refused. (Tr. 195-196, 199) Had Nollner been present counsel for defendant would have proceeded to trial. (Tr. 191) Defendant's counsel did not know that Nollner wouldn't come to Phoenix if the case was continued three or four days as plaintiff offered. (Tr. 200) Counsel for plaintiff, who himself does considerable insur-

ance litigation (Tr. 311), testified that in his opinion defendant was not prejudiced at all by the failure of Nollner to appear at the trial under the circumstances. (Tr. 327)

SUMMARY OF ARGUMENT

The failure of Nollner to attend the trial in Superior Court, standing alone, did not constitute a breach of the cooperation clause in defendant's insurance policy. In order to constitute a breach his failure must have been inexcusable, substantial and prejudicial to defendant.

Whether Nollner's absence from the trial was such a failure was a question of fact, the burden of establishing which rested upon the defendant.

Nollner had not received timely notice of the first two trial settings. The third setting was vacated by the Superior Court on its own motion. Defendant did not seek to avoid the December 19 date when it was set as it easily could have done. Instead it forced Nollner to request another continuance because of the heavy work of the Salvation Army during the Christmas season.

Nollner was not only prepared but in fact had made arrangements to come to Phoenix for the January 11 trial. On the morning he was to leave he was informed that two of his fellow workers were ill and he was requested by his superior to leave immediately for Monte Vista and Alamosa. Nollner wired this information to defendant's counsel and requested that the trial be postponed.

Defendant's counsel had long before taken the depositions of Nollner's daughter and the plaintiff, the only two surviving passengers in Nollner's automobile. Although defendant made no offer to take Nollner's deposition it was finally taken at plaintiff's insistence. In his deposition Nollner testified fully as to the accident and how it occurred, and he expressly denied that he had admitted to anyone that the accident was his fault. His testimony was favorable to defendant.

Defendant's counsel was fully prepared for the Superior Court trial. While still counsel of record for Nollner he refused to

stipulate that Nollner would testify to the facts set forth in the affidavit which he himself had prepared. He refused to stipulate that Nollner's deposition be admitted in evidence without objection. He refused to stipulate that the cause be tried to the court instead of a jury. He even refused to stipulate to a continuance which Nollner desired and which he, as Nollner's counsel, had requested.

Defendant's entire course of conduct evidences a constant effort on its part to withdraw from Nollner's defense and to deny him and the plaintiff the benefits of the policy for which it had contracted. Defendant did not act in entire good faith and did not represent Nollner to the benefit of his interests.

Under the circumstances the absence of Nollner from the trial was excusable and defendant was in no way prejudiced thereby. Further, defendant waived Nollner's absence from the trial.

ARGUMENT

I

Failure to Attend Trial, Standing Alone, Does Not Constitute Breach of Cooperation Clause

We do not dispute defendant's contention that plaintiff has no greater right to recover against the insurance company than the insured, Nollner, would have. Nor do we dispute that the failure of the insured to attend trial may, under some circumstances, constitute a breach of the cooperation clause in defendant's insurance policy. But the failure of the insured to attend trial certainly does not under all circumstances constitute a breach of the cooperation clause.

Failure to Comply Must Be Inexcusable And Prejudicial

By the great weight of authority, to constitute a breach of the cooperation clause there must be lack of cooperation in some substantial and material

respect that results in prejudice to the insurer.

Federal Decisions:

Standard Accident Ins. Co. v. Winget (C.A. 9), 197 Fed. (2d) 97, 34 A.L.R.(2d) 250

Norwich Union Indem. Co. v. Haas (C.A. 7), 179 Fed. (2d) 827

General Acc. Fire & Life Assur. Corp. v. Reinert (C.A. 5), 170 Fed.(2d) 440

State Automobile Mut. Ins. Co. v. York (C.C.A. 4), 104 Fed. (2d) 730

State Farm Mut. Auto. Ins. Co. v. Koval (C.C.A. 10), 146 Fed.(2d) 118

Pacific Indemnity Co. v. McDonald (C.C.A. 9), 107 Fed. (2d) 446

Associated Indemnity Corp. v. Davis (C.C.A. 3), 136 Fed. (2d) 71

Alabama:

George v. Employers' Liability Assur. Corp., 122 So. 175, 72 A.L.R. 1438

California:

Hynding v. Home Acc. Ins. Co., 7 Pac(2d) 999, 85 A.L.R. 13

Panhans v. Associated Indemnity Corp., 47 Pac.(2d) 791

Norton v. Central Surtey & Insurance Co., 51 Pac.(2d) 113

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Wormington v. Associated Indemnity Corp., 56 Pac.(2d) 1254

Colorado:

Farmers Automobile Inter-Insurance Exchange v. Konugres, 202 Pac.(2d) 959

Connecticut:

Rochon v. Preferred Accident Ins. Co. of New York, 171 Atl. 429

Delaware:

Brooks Transp. Co. v. Merchants' Mut. Cas. Co., 171 Atl. 207

Florida:

American F. & Cas. Co. v. Vliet, 4 So.(2d) 862

Idaho:

Leach v. Farmer's Automobile Interinsurance Exch., 213 Pac. (2d) 920

Kentucky:

Metropolitan Cas. Ins. Co. of New York v. Albritton, 282 S.W. 187

Louisiana:

Levy v. Indemnity Ins. Co. of North America, 8 So.(2d) 774

Maine:

Medico v. Employers' Liability Assur. Corp., 172 Atl. 1

Michigan:

Bernadich v. Bernadich, 283 N.W. 5

Kennedy v. Preferred Automobile Ins. Co., 30 N.W.(2d) 46

Missouri:

Finkle v. Western Automobile Ins. Co., 26 S.W.(2d) 843

North Carolina:

McClure v. Accident & Cas. Ins. Co., 49 S.E.(2d) 742

Oregon:

Riggs v. New Jersey Fidelity & Plate Glass Co., 270 Pac. 479

Pennsylvania:

Conroy v. Commercial Casualty Ins. Co., 140 Atl. 905

Bachman v. Monte, 192 Atl. 485

Cameron v. Berger, 7 Atl.(2d) 293

Washington:

Taxicab Motor Co. v. Pacific Coast Casualty Co., 132 Pac. 393

Lienhard v. Northwestern Mutual Fire Ass'n., 59 Pac.(2d) 916

West Virginia:

Marcum v. State Auto. Mut. Ins. Co., 59 S.E.(2d) 433

See also:

Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 6, Sec. 4059, p. 78

Huddy, Encyclopedia of Automobile Law, Vol. 13-14, Sec. 298, p. 378

Richards on Insurance, Vol. 2, Sec. 361, p. 1189-1190

Absolute Compliance Not Required Contrary to the above authority, defendant urges that any failure to comply strictly with the cooperation clause ipso facto vitiates the policy, regardless of reason or

consequence. (B.A. 30-39) In support of this contention defendant cites *Coleman v. New Amsterdam Casualty Co.* (N.Y.), 160 N.E. 367; *Home Indemnity Co. of N.Y. v. Standard Acc. Ins. Co.* (C.C.A. 9), 167 Fed.(2d) 919; *Glens Falls Indemnity Co. v. Keliber* (N.H.), 187 Atl. 473; *Curran v. Connecticut Indemnity Co.* (Conn.), 20 Atl.(2d) 87; *Hartford Accident & Indemnity Co. v. Partridge* (Tenn.), 192 S.W.(2d) 701; and *Whittle v. Associated Indemnity Corp.* (N.J.), 33 Atl.(2d) 866.

In the *Coleman* case the insured admitted that a mistake had occurred in compounding a prescription but refused to say more unless the insurance company would undertake to pay any judgment against it. The necessity for showing prejudice was not discussed directly. Inferentially however Judge Cardozo held that prejudice must be, and was in fact, shown when he said (160 N.E. 369):

"The question remains whether the conduct of the assured was *such* a refusal to co-operate as to vitiate the policy. We are satisfied it was. * * * The insurer was not required to content itself with an unexplained admission that a mistake had occurred, when, coupled with the admission, there was a refusal to say more except at a price. The cause and occasion of the mistake were facts undisclosed, yet important to be known. The drugs or their containers might have been misbranded by the manufacturer or by some one else. The ingredients might have been harmless. In divers ways, there might be defense to a charge of negligence, or at all events palliation, though mistake were conceded. The default of the assured was more than sluggishness or indifference, *phases of thought and conduct that might be the subject of varying inferences when considered by a jury.* * * *" (emphasis supplied)

In the *Home Indemnity* case the insured had given several statements to the company with regard to the accident, all inconsistent. On the question of prejudice the Court quoted from the *Coleman* case and said (167 Fed.(2d) 925):

"From the foregoing, therefore, it will be seen that there is impressive authority for the proposition that an insurer need not show that it has been prejudiced by the insured's lack of

co-operation. If the terms of the policy are plain, most courts hold that the insured's breach of the co-operation clause ipso facto relieves the insurer of liability.

"It is not necessary, however, for us to adopt this somewhat strict rule of construction. Other considerations compel us to the conclusion that the insurer cannot be held liable in the instant case."

The Court went on to hold that the insurance company in fact had been prejudiced.

In the *Glens Falls* case the insured had disappeared without explanation. The Court specifically said (187 Atl. 477):

"* * * the character of the assured's conduct and the importance of its probable effect upon the interests of the insurer may be considered for the purpose of determining whether there has been a substantial breach * * *"

In the *Curran* case the Court held that an immaterial and unsubstantial failure of the insured to comply with the cooperation clause does not constitute a breach thereof "and lack of prejudice to the insurer from such failure is a test which usually determines that a failure is of that nature." See 20 Atl.(2d) 87, 89.

In the *Hartford* case the insured had been requested to attend the trial and had promised to do so, but then proceeded to go on a liquor binge and failed to appear. The question of prejudice was not discussed, but certainly it existed and the Court rightfully held that the insured's failure to appear was inexcusable.

The *Whittle* case is the only one cited by defendant, and the only one we have been able to find, which holds that the failure of the insured to comply strictly with the cooperation clause, no matter how inconsequential, ipso facto vitiates the policy regardless of the circumstances or prejudice. This case is clearly against the weight of authority and should be disregarded.

The Law of Arizona The Arizona Supreme Court has never had occasion to decide a case similar to this. In *Watson v. Ocean Accident & Guaranty Corp.*, 238 Pac. 338, and *Massachusetts Bonding & Ins. Co. v. Arizona Concrete Co.*, 56 Pac.(2d) 188, the question of failure to give

notice of the accident or loss was involved. The Court held that the failure to give notice as specified in the insurance policy did not vitiate the same in the absence of showing the insurer was prejudiced thereby. In *Berry v. Acacia Mut. Life Ass'n.*, 67 Pac.(2d) 478, the insurance policy required proof of disability before default in the payment of the premium. The claimant became ill and unable to make such proof within the prescribed time. The Arizona Supreme Court held that the policy requirement was a condition precedent and reviewed the cases holding an insured to strict compliance therewith. These cases were expressly rejected however, the Court holding (67 Pac.(2d) 482:

"The matter has never been before the courts of Arizona, and we consider ourselves, therefore, at liberty to adopt that rule which seems most in consonance with the general principles of equity."

Mindful of the harshness of forfeiture, the Arizona Supreme Court applied the principles of equity, held that the claimant was excused from strict compliance with the condition precedent and permitted him to recover.

The *Whittle* case, *supra*, sets forth an extreme, and by far the minority, rule of interpretation. It is evident from the foregoing cases that the Arizona Supreme Court would not adopt this view. It would most certainly adopt the rule "most in consonance with the general principles of equity"—the majority rule, which holds that to constitute a breach of the cooperation clause there must be a lack of cooperation in some substantial and material respect that results in prejudice to the insurer.

Case Tried on Theory Prejudice Must be Shown

Both in the testimony presented by it and in the findings of fact and conclusions of law which it proposed, defendant proceeded in the trial court on the theory that it was necessary to show defendant had been prejudiced by Nollner's absence from the trial. (Tr. 9-13, 30-33, 131, 174-175) This was also the theory of the plaintiff. (Tr. 16-19, 20-26, 327) Defendant is now precluded from urging a

different theory on this appeal. 3 *Am. Jur., Appeal and Error*, Sec. 253, p. 35.

II

Nollner's Absence Was Excusable and Did Not Prejudice Defendant

Whether or not Nollner failed to cooperate in some substantial and material respect that resulted in prejudice to defendant was a question of fact, the burden of establishing which rested upon the defendant. *State Farm Mut. Auto Ins. Co. v. Koval* (C.C.A. 10), supra, 146 Fed.(2d) 118; *Norton v. Central Surety & Insurance Co.* (Cal.), supra, 51 Pac.(2d) 113; *Leach v. Farmer's Automobile Interinsurance Exch.* (Idaho), supra, 213 Pac.(2d) 920; *Finkle v. Western Automobile Ins. Co.* (Mo.), supra, 26 S.W. (2d) 843; *Cameron v. Berger* (Pa.), supra, 7 Atl.(2d) 293. The trial court determined that question in favor of the plaintiff. Its findings cannot be set aside unless they are clearly erroneous. Rule 52(a), *Federal Rules of Civil Procedure*, 28 U.S.C.A.; *Lasiter v. Guy F. Atkinson Co.*, (C.A. 9), 176 Fed.(2d) 984; *Bjornson v. Alaska S. S. Co.* (C.A. 9), 193 Fed.(2d) 433.

Nollner Was Hindered By His Work Defendant points to the fact that the Superior Court trial was continued four times, three times on motion for continuance filed by its counsel. How this can possibly benefit defendant's position escapes us. Defendant admits there had been no refusal by Nollner to appear for the June 6 and July 13 trial settings. The exigencies of his employment had led Nollner to request that these settings be continued. But he need not have made this request, for the record is clear that defendant did not give Nollner timely notice of either setting. As to the effect of such failure see *Commercial Cas. Ins. Co. v. Strobe* (C.A. 3), 202 Fed.(2d) 599.

Nollner had scheduled his vacation to coincide with the September 25 trial setting. The Superior Court however could not hear the trial on that date and reset the same, on its own motion,

for December 19. By the time defendant advised Nollner of this change it was too late for him to change his vacation. The December 19 trial setting was right in the middle, so to speak, of the Christmas season. The vast and splendid work of the Salvation Army during this period needs no explanation. It is commonly known. That Nollner could not leave during this period should have been expected by defendant. Yet there was no showing that when the September 25 date was vacated defendant requested of the Superior Court or counsel for plaintiff that the action be set at a later date. Instead defendant now points to its motion for continuance as the magnanimous gesture.

Defendant knew of the January 11 trial setting on December 17 but made no effort to advise Nollner of it until December 22. Nevertheless Nollner made arrangements to attend the trial. On January 9 he advised defendant and it was a fact, that he made reservations to fly to Phoenix on January 10. On the morning of January 10 he learned that two field men for the Salvation Army were ill and his superior asked him to leave immediately for Monte Vista and Alamosa. Nollner immediately wired defendant's counsel relating the facts and requesting a postponement. Later that afternoon defendant sent its Denver counsel and a court reporter to take a statement from Nollner. (Tr. 241-248) Nollner was not represented by an attorney. In the best way he knew how he explained the situation. Defendant wishes this Court to believe, from the testimony appearing on page 248 of the transcript, that Nollner could have attended the trial on January 11 if he wanted to but he just didn't care enough about it.

Nothing could be farther from the truth. A fair reading of the entire transcript reveals that Nollner cared a great deal about the trial. It is equally plain that during the course of this last statement defendant's counsel was putting words in Nollner's mouth and Nollner was becoming somewhat perturbed. Nollner attempted to explain that he was urgently needed to go to Monte Vista and Alamosa because of the illness of his fellow workers, that his superior had asked him to leave immediately and that while he could come to Phoenix if he wanted to, he would thereby

place his job in jeopardy.

Defendant's Counsel Was Fully Prepared

Long prior to the Superior Court trial defendant's counsel had taken the depositions of Nollner's daugh-

ter and the plaintiff, the only two surviving passengers in Nollner's automobile. Defendant was therefore fully apprised as to their version of how the accident happened as well as any admissions which they claimed Nollner to have made. Defendant made no effort to take Nollner's deposition. Nevertheless it was finally taken at the insistence of counsel for plaintiff. In his deposition Nollner testified fully as to the accident and how it occurred. His testimony was favorable to defendant. He expressly denied that he had admitted to anyone that the accident was his fault. Counsel for defendant was present and had the opportunity to ask any questions he desired.

Defendant's counsel was fully prepared to present Nollner's defense. Counsel for plaintiff offered to stipulate that Nollner would testify to the facts set forth in the affidavit for continuance. In addition he offered to stipulate that Nollner's deposition be admitted in evidence without objection. And he also offered to stipulate that the jury be discharged and the case tried to the Court.

From the foregoing the trial court was fully justified in concluding that Nollner's attendance at the trial was not necessary and excusable, and that defendant was not prejudiced by his absence.

Nollner's Presence Was Not Necessary

Defendant argues that Nollner's absence showed lack of interest. The argument is without merit. Nollner's

telegram was read to the Court and the circumstances of his absence fully explained. The case was to be, and was in fact, tried to the Court, not a jury. In *Glens Falls Indemnity Co. v. Keliber* (N.H.), supra, 187 Atl. 473, the Court said that in the trial of cases by jury the absence of the defendant, if not adequately explained, is a circumstance chiefly persuasive as distinguished from probative in its effect. In this case Nollner's absence was more than adequately explained. It must be presumed that the

Court will decide a case on the evidence in the record, of which Nollner's deposition was to be a part. It also must be presumed that where defendant's absence is satisfactorily explained the Court will not indulge in capricious speculation as to lack of interest.

Defendant argues that Nollner's deposition was admitted in evidence and plaintiff nevertheless recovered judgment; therefore the deposition was insufficient. Defendant overlooks the fact that the Superior Court was wholly deprived of the benefit of any cross-examination of plaintiff's witnesses or argument on Nollner's behalf. It is a virtual cliché among trial lawyers that cases are many times won or lost on cross-examination and argument.

In *Lienhard v. Northwestern Mut. Fire Ass'n.* (Wash.), supra, 59 Pac.(2d) 916, plaintiffs were injured in an automobile collision between the car in which they were riding and an automobile driven by one Marston who was insured by defendant insurance company. Plaintiffs sued Marston, recovered judgment, then brought an action against the defendant. The insurance company set up in defense, inter alia, that Marston breached the cooperation clause of the policy for the reason that he absented himself from the trial. The finding of the lower court that the insured had not unreasonably refused to cooperate was affirmed and the court said (59 Pac.(2d) 919-920):

"* * * In the present case, the insured did not run away, but necessarily removed to California, on assignment by his employer. While it may be inferred that Marston did not inform the appellants' attorneys of his removal to California, they could have learned of his whereabouts by inquiring at the telephone company. But they did know where he was as early as the tenth of January, twenty days before the date set for trial. They knew that he was employed and could not leave his work without financial loss, and that he could not come without incurring expense. After some correspondence, they finally advised him by telegraph that they would pay only his traveling expenses and would not pay for loss of time.

* * *

"Apart from this, the appellants took no steps to secure the deposition of Marston. After their correspondence with him had shown reluctance on his part to return, and since his

presence was needed as a witness only, it would seem that they were lacking in diligence in not taking his deposition. While, at the trial, they applied for, and were denied, a continuance of sixty days, this request was to enable them to have Marston present, not for time to take his deposition. We cannot assume from the record that he would have refused to testify had a commission issued."

After counsel for defendant withdrew from the Superior Court action as attorney for Nollner, he remained in the court room and listened to that trial as an interested spectator. Although he was a witness at the trial of the instant case, it is interesting to note that he omitted to testify that he was surprised by or unprepared to meet and contradict any of the evidence introduced at the Superior Court trial.

In *Wormington v. Associated Indemnity Corp.* (Cal.), supra, 56 Pac.(2d) 1254, plaintiff was injured in an automobile accident by the negligence of one Locke who was insured by defendant insurance company. Upon recovery of judgment against Locke plaintiff sued defendant insurance company which set up the defense of lack of cooperation by Locke in that he failed to attend the trial. The Court held that violation of the cooperation clause cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was prejudiced thereby, and stated (56 Pac.(2d) 1256-1257):

"The question of such prejudice was given consideration by the trial court, and, while the assured did not appear at the trial, he did report the accident within 48 hours after it occurred, and gave his deposition. At the time the assured's deposition was taken, appellant's counsel was present, with full opportunity to examine the assured. In our opinion, the finding of the trial court that the assured fully co-operated with the defendant insurance company in the preparation of the defense of said action, and that, if there was any lack of co-operation on the part of said assured, the same was not prejudicial, must, in view of the conflict in the evidence with regard to assured's conduct, be upheld, because of the substantiality of evidence to sustain the decision arrived at by the trial court upon this issue."

Likewise in this case there is ample evidence to sustain the de-

cision of the trial court.

III

Defendant Waived Nollner's Absence

As counsel for plaintiff testified, the question of good faith or bad faith is very much a part of this action.

The evidence shows that on May 10, 1950 defendant's claims manager in Berkley, California, wrote a letter to defendant's Colorado claims manager wherein he stated that a *complete refusal* on Nollner's part to attend the June 6 trial would be definite indication of lack of cooperation and the matter of actually extending a defense would be given serious consideration. This letter was written before defendant's counsel had ever communicated with Nollner informing him of the trial, at a time when it is conceded he had not refused to attend and despite the fact that defendant had not given Nollner timely notice of the trial. Defendant, laying the foundation for withdrawal, sent its Denver counsel to take a court reporter's statement from Nollner and therein advised him of the consequence of his refusal to cooperate. Nollner stoutly maintained that he was not refusing to cooperate but had made a prior commitment before receiving notice of the trial.

On July 7 Nollner telephoned defendant's Phoenix counsel and stated that he would not be able to attend the July 13 trial. The very next day—July 8—he sent the telegram heretofore quoted. This telegram made no reference to the telephone conversation of the previous day and conveys the impression that Nollner was informing defendant's counsel, for the first time, of his inability to attend the trial on July 13. It is of extreme interest that on the same day—July 8—Nollner wrote his daughter stating that he had talked to defendant's counsel and "it was finally decided by all parties, lawyers and insurance men, that I can not afford to jeopardize my work and my job and whatever happens I must stay here at present for I can not possibly spend a week away at this time." Defendant argues that this letter was hearsay. It was not. It was circumstantial evidence of Nollner's state of mind. Although defendant's counsel filed a motion for

continuance of the July 13 trial setting, he did so in the hope that it would be denied so that he could withdraw for lack of cooperation. The record is clear that counsel for defendant persistently threatened to withdraw as a device to force a compromise settlement. (Tr. 154-160)

Upon receipt of Nollner's January 10 telegram, defendant's counsel filed a motion for continuance on Nollner's behalf. The continuance was at first resisted by counsel for plaintiff who offered to stipulate, in accordance with Arizona law, that Nollner if present would testify to the facts set forth in the affidavit annexed to the motion. Because it was so resisted and because counsel for Nollner refused the stipulation, a continuance was denied.

Thereupon counsel for defendant on January 11 filed a motion to withdraw as counsel for Nollner. Immediately prior to the hearing on this motion counsel for defendant renewed an offer to settle the case for \$3,000.00. During the course of argument on this motion and before it was granted counsel for defendant acknowledged that he was fully prepared to go to trial except for a final conference with Nollner. Counsel for plaintiff offered to stipulate that Nollner's deposition be admitted in evidence without objection, that the jury be discharged and the case tried to the court and that *the case be continued three or four days*. The proffered stipulations were refused by counsel for defendant who was still counsel of record for Nollner.

Defendant argues that the stipulation for continuance was offered for the purpose of forcing defendant to trial without Nollner present. That is not so. The motion for continuance had been denied and counsel for plaintiff was therefore entitled to have the cause tried that very day. Counsel for defendant had said that if Nollner were present he would proceed to trial. The sole purpose therefore of offering to stipulate to a continuance was to enable defendant's counsel to again contact Nollner and to have him present at the trial. (Tr. 126, 187-189, 195-196) If defendant's counsel had accepted plaintiff's offer to stipulate for a three or four day continuance, the two ill co-workers (whose illness prevented Nollner's attendance on January 11) might have re-

covered from their illness or another substitute for them found, thereby enabling Nollner to be present at the trial.

Rule 80(e), *Arizona Rules of Civil Procedure* (Sec. 21-2006, *Arizona Code* 1939) provides as follows:

"When the appearance of counsel has been entered for a party in any action or proceeding, he will be held responsible by the court for the conduct of the action until formal notice of withdrawal approved by the court and entered upon the minutes."

Until the motion for withdrawal had been granted it was the duty of counsel for defendant to represent Nollner in a manner most beneficial to Nollner's interests. In refusing the offered stipulations it is manifest that this was not done and that all efforts instead were directed to setting a stage for an attempted escape from liability under the policy on the claim of lack of cooperation.

It is to be remembered that in his January 10 telegram Nollner had expressed the hope that the trial could be postponed. When a postponement was offered by counsel for plaintiff it was the solemn duty of defendant's counsel to accept it on Nollner's behalf. So was it the duty of defendant's counsel to accept on Nollner's behalf the other stipulations offered.

In considering all the evidence and the circumstances of this case the trial court was amply justified in concluding that defendant was searching for an excuse to withdraw from Nollner's defense and did not act in entire good faith towards him. The trial court was likewise justified in concluding that under the circumstances defendant waived Nollner's absence and may not assert that his failure to attend the trial violated the cooperation clause. See *Bachman v. Monte* (Pa.), *supra*, 192 Atl. 485. The question of bad faith or waiver was properly decided as a matter of fact.

CONCLUSION

The trial court heard and observed the witnesses, duly weighed the evidence, and decided the issues in favor of plaintiff. Defendant would have this court substitute its judgment for that of the trial court. We respectfully urge that the ruling of the learned

trial court was not erroneous and certainly in no sense of the word "clearly erroneous".

No case has been cited by defendant, and we are unable to find one, that is squarely in point. Indeed, such discovery can hardly be expected in cases where the circumstances are so apt to be different. But we do wish to call the Court's particular attention to its statement in *Standard Acc. Ins. Co. of Detroit, Mich. v. Winget* (C.A. 9), 197 Fed.(2d) 97, 103 as follows:

"These cases emphasize the fact that cooperation implies not an abstract conformity to ideal conduct, but a pragmatic question to be determined in each case in the light of the particular facts and circumstances. And when a jury, weighing the circumstances surrounding a particular event, has concluded that there is no lack of cooperation, and the trial judge, who heard the same testimony, has accepted the verdict, it should not be disturbed on appeal."

The judgment and order appealed from should be affirmed.

Respectfully submitted,

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No. 14560

IN THE

United States Court of Appeals

For The Ninth Circuit

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY, a corporation,

Appellant,

vs.

AUDRA H. PALMER,

Appellee.

Appeal from the United
States District Court for
the District of Arizona

REPLY BRIEF OF APPELLANT

SCOVILLE & LINTON

Attorneys for Appellant

FILED

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States District Court for
the District of Arizona

REPLY BRIEF OF APPELLANT

I.

Reply To Contention of Appellee That Nollner's Absence Was Not Prejudicial.

Appellee on page 9 of her Brief admits that failure of the insured to attend may under some circumstances constitute a breach of the cooperation clause in the Defendant's insurance policy and goes further to state that failure of the insured to attend trial does not under all circumstances constitute a breach of the cooperation clause; and, in proof of this, Appellee cites numerous cases on pages 10 and 11 of her Brief, which cases are

distinguishable. We shall discuss the cases that relate to failure of the insured to attend the trial, since many of the cases set forth on pages 10 and 11 of Appellee's Brief do not relate to that fact but to other elements not material to the decision of this matter. A majority of the cases cited do not relate to failure to appear. We shall first discuss all of the Federal cases and then only the state cases that relate to failure to appear at trial.

The first case cited is a case decided by this Honorable Court, being *Standard Acc. Ins. Co. of Dertoit, Mich. v. Winget*, (C.A. 9), 197 Fed. (2d) 97, 34 A.L.R. (2d) 250. In that case the insured at the time of his deposition stated that he had not been drinking but later, and prior to the trial, he changed his statement and admitted that he had had a certain amount of intoxicating beverages and, further, in that case there was no evidence at the trial concerning intoxication.

The next Federal case cited is the case of *Norwich Union Indem. Co. v. Haas*, (C.A. 7), 179 Fed. (2d) 827, which involved a misstatement by the insured as to where he had been on the night of the accident. He later changed his story prior to trial and the insurer's agent knew that the original statement was false. Therefore, there was no prejudice at the time of the trial.

Next is cited the Fifth Circuit case of *General Acc. Fire & Life Assur. Corp. v. Reinert*, (C.A. 5), 170 Fed. (2d) 440. There the insured's daughter made a false statement immediately after the accident to the effect that she was driving the car, when, in fact, a friend had been permitted by her to drive. Five days after the date of the accident she made a correct statement to the insurer.

The Fourth Circuit case of *State Automobile Mut. Ins. Co. v. York*, (C.C.A. 4), 104 Fed. (2d) 730, was an action brought by the wife against the husband who was the insured, and the only lack of cooperation shown was that the husband was angry when charged with collusion, refused to sign certain pleadings, and did not make any suggestions during the trial and was pleased with the verdict. In this case there were some discrepancies in the

statement concerning facts of the accident which related to opinions alone. The insured was not called by appellant's counsel to testify at the trial in the lower Court.

The Ninth Circuit case of *Pacific Indemnity Co. v. McDonald*, (C.C.A. 9), 107 Fed. (2d) 446, was a case where the insured gave an incorrect story as to how the accident occurred. His story was corrected a week later and, in addition, there was a question as to the proper wording of the answer prepared by the company's attorney.

The first of the Federal decisions relating to failure to appear is the case of *State Farm Mut. Auto Ins. Co. v. Koval* (C.C.A. 10), 146 Fed. (2d) 118. In this case the insured did not attend the trial; however, the insurer's counsel admitted that the insured was guilty of negligence in his pleadings. The Court stated as follows:

"In the ordinary case, the absence of the defendant from the trial would hamper the insurance company in presenting its defense."

The above case is certainly distinguishable from the case at bar where the question of negligence was contested, and we respectfully submit that the Court was referring to a case of questionable negligence when it used the phrase "in the ordinary case".

The case of *Associated Indemnity Corp. v. Davis* (C.C.A. 3), 136 Fed. (2d) 71, is clearly distinguishable from the case at bar. In that case the insured refused to attend the first trial; a continuance was obtained; the company withdrew; and thereafter the insured repented and agreed to appear at the next trial.

We will next discuss the state cases cited that deal with the question of failure to appear at the trial. The first of such cases is that of *George v. Employers' Liability Assur. Corp.*, 219 Ala. 307, 122 So. 175, 72 A.L.R. 1438. This case is distinguishable from the case at bar since, first, the company did not tender the expenses, as was required, and, additionally, there were other witnesses who could testify to the same facts. In the case at bar,

Nollner was the only witness for the Defendant who could testify as to all of the facts of the accident.

The case of *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 P. 2d 999, 85 A.L.R. 13, was one where the insured failed to appear for the trial and the court in that case held that the insurer was *clearly* prejudiced by the failure of the insured to appear for the trial. This case has been cited numerous times, although not altogether on the point above set forth.

The case of *Panhans v. Associated Indemnity Corp.*, 8 Cal. App. 2d 532, 47 P. 2d 791, is distinguishable since the insured's written statement showed he could not have testified favorably for the defense on the issue of negligence. Also in that case, the insurer withdrew three weeks prior to the trial after having written a number of letters to the insured which were not answered and letters advising of the trial date were returned undelivered.

The case of *Norton v. Central Surety & Insurance Co.*, 9 Cal. App. 2d 598, 51 P. 2d 113, is distinguishable from the case at bar since in that case the insured was actually present at the trial and testified as a witness; however, non-cooperation was claimed because of the failure to appear until the afternoon of the day before the trial. The insured then told the company's attorney that he would not be at the trial and, if forced to come, his testimony would not be favorable. It was then that the company disclaimed liability. Apparently, however, the insurer continued with the trial of the case and the insured appeared at the trial and testified.

In the case of *Jenson v. Eureka Casualty Co.*, 10 Cal. App. 2d 706, 52 P. 2d 540, the distinguishing factors are that there was no evidence that the insured was told he had to appear for the trial and it could not be found that he wilfully failed to appear.

The case of *Wormington v. Associated Indemnity Corp.*, 13 Cal. App. 2d 321, 56 P. 2d, 1254, is the only case that we can find that should give any comfort to Appellee. Yet this case is not too clear as to what actually happened except the bare state-

ment that the insured did not attend the trial of the suit. In this case the Court stated, among other things:

"In our opinion, the finding of the trial court that the assured fully co-operated with the defendant insurance company in the preparation of the defense of said action, and that, if there was any lack of co-operation on the part of said assured, the same was not prejudicial, must, in view of the conflict in the evidence with regard to assured's conduct, be upheld, because of the substantiality of the evidence to sustain the decision arrived at by the trial court upon this issue."

We do not know from reading the case what the Court meant when it said "because of the substantiality of evidence to sustain the decision arrived at by the trial court on this issue." The case does not indicate whether or not there was a disputed fact question, and, for some reason, this case has not been followed or cited as has the *Hynding v. Home Acc. Ins. Co.* case, supra, which held the insurer was clearly prejudiced by such failure.

In the Florida case of *American F. & Cas. Co. v. Vliet*, 148 Fla. 568, 4 So. (2d) 862, the assured did not appear at the trial but in that case there was no tender of expenses.

In the Kentucky case of *Metropolitan Cas. Ins. Co. of New York v. Albritton*, 214 Ky. 16, 282 S.W. 187, the policy itself did not require the attendance of the assured at the trial and in that case the company actually tried the case.

The Michigan case of *Kennedy v. Dashner (Preferred Automobile Ins. Co., Garnishee)*, 319 Mich. 491, 30 N.W. (2d) 46, is certainly distinguishable as disclosed by this statement from the Court:

"The record does not disclose that Dashner could have been of any assistance at the trial if he had been present. He was not an occupant of the car at the time of the accident, and probably could have offered no testimony pertaining thereto."

In the Missouri case of *Finkle v. Western Automobile Ins. Co.*, 224 Mo. App. 285, 30 N.W. (2d) 46, that policy did not require attendance at the trial and no effort was made to locate the

assured until two weeks before the trial and further the company did not withdraw until the second day of the trial. This case was distinguished by the Missouri Court in the case of *Bauman vs. Western and Southern Indemnity Co.*, 230 M.A. 835, 77 S.W. (2d) 496, referred to in our opening brief on pages 27 and 49.

In the Pennsylvania case of *Conroy v. Commercial Casualty Ins. Co.*, 292 Pa. 219, 140 Atl. 905, the Court states:

"If the insured refuses to give any information, so that the company is unable to make defense, it cannot be said there is cooperation, and in that case, a recovery should be denied. *Coleman v. New Amsterdam Casualty Co.*, 247 N.Y. 271, 160 N.E. 367; 126 Misc. Reports, 380; 213 N.Y.S. 522. The same is true if he absents himself so that his evidence cannot be taken advantage of."

In the Pennsylvania case of *Bachman v. Monte*, 326 Pa. 289, 192 Atl. 485, there was evidence of unquestioned collusion between the insurance company agent and the insured in causing him not to appear at the trial.

In the other Pennsylvania case cited, *Cameron v. Berger*, 336 Pa. 229, 7 Atl. (2d) 293, the insured disappeared from her home to avoid arrest and was not present at the trial, and the company finally disclaimed responsibility by letters written to the insured. The Court held that failure to appear was, as a matter of law, lack of cooperation and that the breach was material.

The last case cited on page 11, relating to failure of the insured to appear, *Lienhard v. Northwestern Mutual Fire Ass'n*, 187 Wash. 47, 59 P. 2d 916, is distinguishable since the insurer did not withdraw until after the selection of the jury and there was no tender of expenses to the insured as was requested.

The texts cited on page 11 do not in any way hold that failure to attend the trial is not prejudicial. There are cases which have a specific holding that failure to attend trial as a matter of law is prejudicial. *Hynding v. Home Acc. Ins. Co.*, supra; *Schneider v. Autoist Mutual Ins. Co.*, 346 Ill. 137; 178 N.E. 466.

In the case of *Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co.*, 203 App. Div. 796, 197 N.Y.S. 606, the court stated:

"I think that the condition of the policy requiring co-operation on the part of the assured in the defense of the action brought against him by the injured party is one of great importance. Without the presence of the assured and his aid in preparing the case for trial, the insurance company is handicapped and such lack of co-operation may result in making the action incapable of defense. In the case at bar, the statement made to the insurance company that the chauffeur was using the automobile for his own purposes without permission of the assured, constituted, if true, a perfect defense to the action brought by the injured party. To enable the company to defend the action it was manifestly essential that the assured be present and be examined in his own behalf as a witness upon the trial. This, by reason of his disappearance, was impossible."

II.

Reply To Contention of Appellee That Nollner's Presence Was Not Necessary.

We feel that we should point out to the Court that Nollner and his deceased wife had been friends with Mrs. Palmer for some years and had lived in the same household for sometime prior to the accident. (R. 210)

In the case of *State Automobile Mut. Ins. Co. v. York*, *supra*, the court stated:

"Where such relationship exists, however, the conduct and testimony of the parties should be carefully scrutinized by court and jury, since the interest of the parties is not really adverse."

In that case the wife sued the husband under the insurance policy. It is true that no husband and wife relationship existed in the case at bar but there was a friendly relationship which we maintain cannot be overlooked. In view of this, let us explore the possible dangers of a holding that the failure to appear at a trial does not prejudice the defendant as a matter of law when the facts of negligence are disputed. An insured, friendly with a guest passenger in his automobile, could easily collude against the insurance

company for the financial gain of the plaintiff, and refuse to attend the trial. Nollner well knew that his testimony would show no liability on his part. Might it not be said that he well knew that his presence as a witness and his testimony under oath would at least tend to cause him to defeat the recovery of his friend, the plaintiff? A ruling holding that attendance at the trial of the case, when the facts of the case are disputed, is not prejudicial, could easily mean that all insurance companies would be at the mercy of collusion between an insured and a friendly plaintiff, be it a guest passenger or otherwise.

Perhaps this sounds remote in this particular instance but we cannot overlook the relationship of the parties, nor can we overlook the evidence which we contend was inadmissible hearsay evidence that constituted the second paragraph of Finding of Fact No. 7. Close examination will point out that that statement was written on July 8, 1950. Now we would like to point out the wording in the deposition of Mr. Nollner on July 21, 1950, this time under oath, which was as follows:

"Q. (Mr. Romley) Has Mr. Eckroth or any of the gentlemen here in Denver or Mr. Linton suggested to you that it would be all right for you not to go?

"A. (Mr. Nollner) No, no, no; they insisted I do.

"Q. Was it finally decided by all of the parties you have mentioned that you could not jeopardize your work and your job, that you should stay here?

"A. No. I decided that myself.

"Q. You are sure of that?

"A. I am positive of that.

"Q. None of them suggested to you that it would be better to wait and go later?

"A. Oh, no. no. In fact, I was warned it might fall right in my lap and I said, "That's a responsibility I have to take'. I am taking it, and not until the 14th or 15th did I know that the trial had been postponed." (R. 235-236)

We feel that the above certainly disproves the wording contained in Finding of Fact No. 7 since it was subsequent and under oath but it certainly tends to show what could happen in such a case if collusion was desired between the plaintiff and the insured. The insured might not hesitate to say or write certain things not under oath but be fearful of attending the trial, knowing that he would have to tell the truth and thereby defeat his friend's claim. We feel that this Honorable Court should as a matter of law hold that where the facts of the accident are in serious dispute, the failure of the assured to attend the trial is prejudicial to the insurer.

Appellee contends that Nollner cared a great deal about the trial and wanted to attend the trial and but for the fact of illness of other employees and his work, he would have done so. Appellee attempts to criticize counsel for defendant for allowing the trial to be set on December 19, 1950 near the Christmas holidays and goes into flowery detail complimenting the Salvation Army's work, which certainly is immaterial to the issues.

Appellee apparently overlooks the statements of Nollner appearing in Defendant's Exhibit 25 at page 244 of the Transcript of Record, where he stated that his superior had left it entirely to his (Nollner's) discretion and that he (Nollner) decided not to go to Phoenix and further stated that he would not state whether or not he would go to Phoenix if another postponement was obtained. Testimony showing the same points was covered in our Opening Brief on pages 21, 22 and 23.

III.

Answer To Appellee's Contention That Appellant Waived Nollner's Absence.

Appellee apparently overlooks the well-known fact that a liability insurance policy, such as this, has in it two types of insuring clauses: one, to pay up to the limits of the policy on behalf of the insured all sums which the insured shall become obligated to pay by reason of liability imposed upon him by law for damages;

second, the insuring provision that the company shall defend in his name and behalf any suit against the insured even if the suit is groundless, false or fraudulent.

When Appellee contends that Appellant's counsel violated a solemn duty to Nollner, she overlooks the fact that as regards the coverage of Nollner relating to his defense, this is strictly a personal right between the insurer and the insured. The plaintiff or judgment creditor cannot complain if the company does not defend the insured. The insured always has the right, if the company wrongfully refuses to defend, to employ his own attorney and sue the company for the costs of defense guaranteed under the policy. This right is separate and distinct from the right of the defendant to have the company pay the judgment up to the policy limits, and that right is the only one that the judgment creditor can enforce against the insurance company.

The motion for continuance made at Nollner's request was denied on January 10, 1951. (R. 118, lines 20, 21, 22, 23 and 24; R. 121, lines 4 and 5). Prior to that time and at 3:30 p.m. of that day, as appears in Defendant's Exhibit No. 25 (R. 241), the insured in Denver had refused to come to the trial although he was free to do so. Thereafter and at noon on January 11, 1951 a motion was filed to allow the insurance company's attorneys to withdraw (R. 121, lines 25, 26 and 27). Appellee apparently agrees with the chronological course of events above set forth since they are admitted in the second paragraph of page 3 of Appellee's brief and in the first paragraph of page 7 thereof. Therefore, at the time the proffered offers contained in Finding of Fact No. 9 were made, the motion for continuance had been denied, the assured had been advised of the withdrawal of coverage and defense because of lack of cooperation (R. 254, 255 and 256) and counsel for Appellant was arguing his motion for leave to withdraw.

A greater part of Appellee's contention in this case is based upon what happened during the argument of the motion for leave to withdraw and relates to purported duties of insurer's

counsel at that time. That, we submit, has nothing to do with the true issue of the case since it is argument concerning a matter in which Appellee has no rights. If Nollner had employed his own attorneys after being notified of the withdrawal by the insurance company, and, if such withdrawal was wrongful, he might have had a cause of action against the Appellant but certainly the Appellee can have no interest in that cause of action nor can Appellee complain because no defense was offered but only that coverage as to the third party was denied.

There is nothing that the Plaintiff could do to cure Nollner's breach of his failure to cooperate in argument on the motion for counsel to withdraw. Continuing the case would not do that; neither would the admission of a deposition of Nollner which was strictly procedural and was a matter of right if the witness was more than fifty miles from the court. 21-707 ACA 1939. Neither could this be cured by Appellee's waiver of a jury.

A great deal of Appellee's brief is also taken up with purported inferences showing that the company was laying the groundwork for a withdrawal from the case because of lack of cooperation by not attending the trial. Certainly an insurance company has the right to demand compliance with conditions of its policies and should advise its insureds what would happen if the insured should fail to comply, and there is no reason why the company should not advise its agents to so advise an insured at all times.

IV.

Reply To Contention That Nollner's Presence Was Not Necessary.

Appellee very cagily avoids the inescapable conclusion that Appellant's attorney, or any trial attorney, would have drawn as to the danger of trying a cause to the court or jury in a disputed factual situation when advised another witness (Height, driver of the truck) would be there to testify as to the facts of the accident. (R. 180-181) Appellee passes that by by merely stating that there was no testimony in the District Court trial to the effect that Appellant's counsel was surprised at any testimony in the Superior

Court trial. He is in effect stating that after the case is tried, it should be determined by the Appellant whether or not the presence of the defendant was necessary. We respectfully submit that that is a matter that could only be determined on the basis of the state of the evidence known prior to commencing the trial. If it were a case where liability was admitted, we could not help but agree with counsel for Appellee but in a case where liability was disputed and Appellant's attorneys below were confronted with the possibility of surprise testimony (promised by plaintiff's attorney prior to trial in the lower court), certainly we submit as a matter of law, Nollner's presence was necessary at the trial to properly allow the Appellant to defend under the policy and therefore his failure was a breach of the cooperation clause and clearly prejudicial to Appellant.

Summary of Argument

Appellant has replied to the argument of Appellee as to the vital points raised in Appellee's brief. We feel that Appellant's opening brief amply sets forth the issues on all of the other matters not touched upon in this Reply Brief; and, because of time and space limitations, we have felt it unwise to belabor further argument on those points.

It is respectfully submitted that the decision should be reversed because—

First: There is no showing of bad faith on the part of Appellant and Appellant did all it was required to do to obtain Nollner's presence at the trial.

Second: Nollner's presence was inexcusable for he could have attended the trial had he wanted to do so.

Third: Nollner's presence at the trial was necessary, particularly in view of the fact that this was a case, not where liability was admitted, but where the insured was the driver of the car and the only eye witness favorable to the defendant, in a case where there was a disputed fact situation concerning liability.

Fourth: The Appellant did not waive Nollner's absence. The requirement that the insured attend the trial was a material condition of the policy and the Appellant was prejudiced as a matter of law by Nollner's unexcused failure to appear and therefore the Appellee was not entitled to recover from Appellant.

Conclusion

The judgment should be reversed with directions to enter judgment for the Defendant-Appellant.

Respectfully submitted:

SCOVILLE & LINTON

By WALTER LINTON

219 Heard Building

Phoenix, Arizona

Attorneys for Appellant

No. 14,560

United States Court of Appeals
For the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Appellant,

VS.

AUDRA H. PALMER,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

R. S. CATHCART,

J. BARTON PHELPS,

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FILED

APR 22 1955

PAUL P. O'BRIEN, CLERK

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No. 14,560

**United States Court of Appeals
For the Ninth Circuit**

STATE FARM MUTUAL AUTOMOBILE IN-
SURANCE COMPANY, a corporation,

Appellant,

VS.

AUDRA H. PALMER,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellant respectfully petitions for a rehearing in the above matter to the end that the order dismissing the appeal be vacated and the appeal be heard on its merits.

GROUND'S FOR A REHEARING.

We do not lightly regard the filing of a petition for rehearing.

We respectfully urge that the opinion and order dismissing the appeal and denying a hearing on the merits runs counter (i) to the spirit and purpose of the Rules of Civil Procedure, particularly Rule 61, (ii) to cognate portions of the Judicial Code, particularly 28 U.S.C.A. § 2111, and (iii) to decisions of this Court and the Supreme Court of the United States which have construed such provisions, particularly *Hoiness v. United States* (1948), 335 U.S. 297 and *United States v. Arizona* (1953), 346 U.S. 907.

Well within the time required for the filing of notice of appeal, appellant filed a document reading as follows (Tr. 48-49):

“[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company, insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars (\$10,000.00), together with interest thereon at the rate of six per cent (6%)

per annum from January 18, 1951, and together with Plaintiff's costs incurred therein.

Dated this 17th day of September, 1954.

Scoville & Linton,
By /s/ Walter Linton,
Attorneys for Defendant, State Farm
Mutual Automobile Insurance Com-
pany, a Corporation.

[Endorsed]: Filed September 17, 1954."

We believe that the opinion errs when it holds that this document was insufficient to invoke the appellate jurisdiction of this Court to review the judgment in this case. Such judgment, so far as it is at all formalized (apart from the findings of fact and conclusions of law), appears as follows in an entry in the Civil Docket (Tr. 42):

| | |
|-------|---------------------|
| "Date | Filings—Proceedings |
|-------|---------------------|

* * *

July 6, 1954 6:00 p.m. Enter judgment for the plaintiff Audra H. Palmer against defendant State Farm Mutual Automobile Insurance Company, a corporation, in the sum of \$10,000.00, together with interest thereon at the rate of six per cent per annum from January 18, 1951, until paid, together with her costs herein incurred."

ARGUMENT.

I.

THE NOTICE OF APPEAL, EVEN THOUGH IT REFERRED TO THE DATE ON WHICH THE MOTION FOR NEW TRIAL WAS DENIED, WAS SUFFICIENT TO INVOKE THE APPELLATE JURISDICTION OF THIS COURT TO REVIEW THE FINAL JUDGMENT ENTERED IN THIS CASE.

The sole question in this case is not whether the order of August 24, 1954 was an appealable order, but whether the Notice of Appeal filed by the Appellant was sufficient in form to invoke the appellate jurisdiction of this Court to review the final judgment in this case. .

There was only one final judgment. It awarded the plaintiff (respondent) the sum of \$10,000.00, together with interest thereon at the rate of six per cent per annum from January 18, 1951, together with her costs. The terms of that judgment were embraced in the entry in the civil docket (Tr. 42), and they were set out *in haec verba* in the Notice of Appeal filed by Appellant (Tr. 48-49). We cannot believe that the Notice of Appeal was ineffective because it referred also to the date on which the order denying the motion for a new trial was entered.

A notice of appeal in substantially the same form was held sufficient by the Supreme Court of the United States in *United States v. Ellicott* (1912), 223 U.S. 524. In that case the final judgment was entered against the United States on *May 18, 1908*; the United States filed a motion for new trial which was overruled on *January 4, 1909*; various other motions were

then made and ruled upon and on February 25, 1909 the United States gave notice of appeal and in its notice of appeal specified that it was appealing “*from the judgment rendered in the above-entitled cause on the 4th day of January, 1909.*”

The appellee filed a motion to dismiss the appeal on the ground that it was not from a final judgment “but was merely from the order overruling the motion for a new trial.” The Supreme Court summarily denied the motion to dismiss, stating “The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees . . . treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing . . . has been disposed of; and the time for appeal begins to run from the date of such disposition.”

To the same effect see *Texas-Pacific Railway Company* (1884), 111 U.S. 488, and cases cited in Appellant’s Reply to Appellee’s Motion to Dismiss.

We believe that the form of the notice of appeal filed by the Appellant in the instant case is clearly distinguishable from the form of the notice filed in *Libby, McNeill & Libby v. Alaska Industrial Board*, C.C.A. 9 (1954), 215 Fed. 2d 781, upon which this Court relied in its opinion. In that case the notice of appeal did not refer to any judgment, but, apparently, referred only to a “minute order” denying the motion for new trial. In that respect we submit

that there is a very substantial difference between the notice of appeal involved in the *Libby, McNeill & Libby* case and the notice of appeal filed by us, since our notice of appeal set out in precise terms the judgment complained of.

In addition, we believe that the rule followed by this court in *Libby, McNeill & Libby* runs counter to the rule followed by the United States Supreme Court in *United States v. Ellicott*, supra, and to numerous other cases,* many of which were cited in the memorandum filed by appellant in opposition to the motion to dismiss.

In the discussion just set forth we have shown that numerous courts hold that a notice of appeal which refers only to the date upon which a motion for new trial was denied is sufficient to invoke the Appellate jurisdiction of the court.

Our notice of appeal went much further than the notices of appeal which have been held sufficient in the cases referred to because it actually set out the terms of the judgment complained of. Had our notice

*See for example: *Wilson v. So. Rwy.*, C. C. A. 5 (1945), 147 Fed. 2d 165; *Bates v. Batte*, C. C. A. 5 (1951), 187 Fed. 2d 142; *Inland Freight Lines v. United States*, C. C. A. 10 (1951), 191 Fed. 2d 313; *Porter v. Borden's Dairy*, C. C. A. 9 (1946), 156 Fed. 2d 798; *Wetherbee v. Elgin Etc. Co.*, C. C. A. 7 (1953), 204 Fed. 2d 755; *Shannon v. Retail Clerks etc. Assn.*, C. C. A. 7 (1942), 128 Fed. 2d 553; *Sun-Lite etc. Co. v. Conklin Aviation Corporation*, C. C. A. 4 (1949), 176 Fed. 2d 344; *Sobel v. Diatz*, U. S. Ct. App., Dist. of Col. (1951), 189 Fed. 2d 26; *Safeway Stores v. Coe*, U. S. Ct. App., Dist. of Col. (1943), 136 Fed. 2d 771.

of appeal merely eliminated any reference to the order of August 24, 1954 (that is had the words commencing with "order" and ending with "grants" been eliminated from the notice of appeal) even the most highly technical application of the rules invoked by appellee could not have rendered out notice of appeal subject to the objections here urged.

That technicalities should not be relied upon to abort an appeal appears well established by the doctrines which we now discuss.

II.

THE DEFECT (IF ANY) IN THE NOTICE OF APPEAL WAS OF SUCH A TECHNICAL NATURE THAT IT SHOULD HAVE BEEN DISREGARDED IN ACCORDANCE WITH THE POLICY EXPRESSED IN THE FEDERAL RULES OF CIVIL PROCEDURE AND IN THE JUDICIAL CODE AND THE DECISIONS WHICH HAVE CONSTRUED THEM.

Eliminating any reference to the order of August 24, 1954, our notice of appeal would read as follows:

"Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the . . . judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars (\$10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

We respectfully submit that adding to the above a reference to the order of August 24—or designating the order of August 24 instead of the order of July 6—is not such a departure from the rules as warrants the drastic action of dismissing an appeal without hearing it on the merits.

As stated by Chief Judge Denman in *Cutting v. Bullerdick*, C.C.A. 9 (1949), 178 Fed. 2d 774, “The rule of strict construction does not apply to the acquiring of jurisdiction by an appellate court. On the contrary, the steps taken for an appeal are to be liberally construed as appears from the cases cited . . . ”

The author of the opinion quoted with approval from *R. F. C. v. Prudence Securities, etc. Group* (1941), 311 U.S. 579, where the court stated (p. 582)

“The procedure followed by the petitioners was irregular . . . But the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The Court has discretion where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice.”

As stated in 13 *Cyclopedia of Federal Procedure*, page 473, Sec. 60.94:

“If the notice is sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment.”

We respectfully submit that this Court in its discussion of *Hoiness v. United States* (1948), 335 U.S.

297, overlooks the fact that, although that case involved 28 U.S.C.A. § 777, which has been repealed, it is still authority for the rules stated therein because of the fact that the provisions of 28 U.S.C.A. § 777 have been embodied in Rule 61 of the Federal Rules of Civil Procedure.

In this connection it is to be noted that the Advisory Committee on Rules in its comment on Rule 61 stated (14 Cyc. Fed. Proc. Sec. 68.55) that it was:

“A combination of U. S. C. A., Title 28, § 2111, former § 391 (New Trials; harmless error) and former § 777 (Defects of form, amendments) with modifications. See *McCandless v. United States* 1936, 56 S. Ct. 764, 298 U. S. 342, 80 L. Ed. 1205. Compare former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of former Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). For the last sentence see the last sentence of former Equity Rule 19 (Amendments Generally).”

See also:

Crump v. Hill, C.C.A. 5 (1939), 104 Fed. 2d 36.

Furthermore, it is to be recalled that in the opinion of the Supreme Court in the *Hoiness* case the footnote referring to the repeal of § 777 ended with “and see Rules 1, 15, 61 and 81 Rules of Civil Procedure.”

Again, this Court (in the footnote on page 2 of its opinion) in distinguishing the *Hoiness* case says:

“It should be noted that the statute, 28 U. S. C. (1946 Ed.) § 777, does not apply to this case because the action was not pending prior to the repeal of that section.”

It is quite true that § 777 had been repealed prior to the taking of the appeal in the instant case. However, it lives on in Rule 61, Rules of Civil Procedure, which also embodies 28 U.S.C.A. § 2111 (set out in the margin).*

The rule of the *Hoiness* case, accordingly, is still in effect and requires (we respectfully submit) that the appeal in this case be heard on its merits. In the *Hoiness* case, the Court in speaking of the Notice of Appeal said that the “defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress” in 28 U.S.C.A. § 777.

The last clause of § 777 provided that the “. . . Court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, . . .” This language, we submit, is in substantially the same form as the last sentence of Rule 61 reading “*The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial right of the parties.*”

*28 U.S.C.A. §2111: (“On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties”).

This court in a footnote in its opinion also refers to *United States v. State of Arizona*, C.C.A. 9 (1953), 206 Fed. 2d 159 and 346 U.S. 907, and points out that "The Rules of Civil Procedure do not affect this situation. No appeal lies unless taken from a 'final decision'."

For reasons above stated we submit that the Rules of Civil Procedure, particularly Rule 61, do apply to this situation and that the appeal in this instance (as we have already shown) was in fact taken from a "final decision".

We believe that the *Hoiness* case stands for the proposition that where the notice of appeal sufficiently apprises the appellee of the judgment from which appeal is taken, any technical deficiency in specifying the judgment must be disregarded. "No one was misled or injured." (*Voehl v. Indemnity Insurance Co.* (1933), 288 U.S. 162 at 177.)

Again, if the Notice of Appeal in our case had simply eliminated any reference whatsoever to the order of August 24, 1954, not even the most hyper-technical construction of the rules and statutes dealing with appeal could in any wise have impeached its validity, or in any way have been used as the predicate for a claim that it was insufficient as a matter of law to invoke the appellate jurisdiction of this court to review the judgment in this case.

III.

CONCLUSION.

In conclusion, it is respectfully submitted that a rehearing should be granted in this case.

Dated, San Francisco, California,

April 20, 1955.

Respectfully submitted,

R. S. CATHCART,

J. BARTON PHELPS,

BLEDSON, SMITH, CATHCART & PHELPS,

SCOVILLE & LINTON,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL.

In my judgment the foregoing petition for rehearing is well founded. I hereby certify that it is not interposed for delay.

Dated, San Francisco, California,
April 20, 1955.

R. S. CATHCART.

No. 14561

**United States
Court of Appeals
for the Ninth Circuit**

YAKUTAT & SOUTHERN RAILWAY, a Corporation;
LIBBY, McNEILL & LIBBY, a Corporation, and
BELLINGHAM CANNING COMPANY, a Corporation,

Appellants,

vs.

THE CITY OF YAKUTAT,

Appellee.

Transcript of Record

**Appeal from the District Court
for the District of Alaska
Division Number One**

FILED

JAN 26 1955

PAUL P. O'BRIEN,

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-7-55

CLERK

No. 14561

**United States
Court of Appeals**
for the Ninth Circuit

YAKUTAT & SOUTHERN RAILWAY, a Corporation;
LIBBY, McNEILL & LIBBY, a Corporation, and BELLINGHAM CANNING
COMPANY, a Corporation,

Appellants,

vs.

THE CITY OF YAKUTAT,

Appellee.

Transcript of Record

**Appeal from the District Court
for the District of Alaska
Division Number One**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

R. E. ROBERTSON,
200 Seward Bldg.,
Juneau, Alaska,
For the Appellants.

WILLIAM L. PAUL, JR.,
P. O. Box 81,
Juneau, Alaska;

FREDERICK PAUL,
755 Dexter Horton Bldg.,
Seattle 4, Washington,
For the Appellee.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau

No. 6734-A

In the Matter of:

The Delinquent Tax Roll of Real and Personal
Property for the City of Yakutat, Alaska, for
the Years 1950 and 1951.

YAKUTAT & SOUTHERN RAILWAY, LIBBY,
McNEIL & LIBBY, and BELLINGHAM
CANNING COMPANY, Each a Corporation,
Objectors.

OBJECTIONS OF YAKUTAT & SOUTHERN
RAILWAY, LIBBY, McNEIL & LIBBY,
AND BELLINGHAM CANNING COMPANY

Yakutat & Southern Railway, a corporation, hereinafter referred to as Railway, is now and during the City of Yakutat's tax year commencing June 1, 1950, hereinafter referred to as 1950, and tax year commencing June 1, 1951, hereinafter referred to as 1951, was the sole owner of real property situated within the City of Yakutat, hereinafter referred to as City, and said Railway and Libby, McNeill & Libby, a corporation, hereinafter referred to as Libby, were during the tax year 1950 the several but not joint owners of various parcels of personalty situated within said City, and said Railway and Bellingham Canning Company, a corporation, hereinafter referred to as Bellingham,

were during the tax year 1951 the several but not joint owners of various parcels of personalty situated within said City; that said Railway, Libby, and Bellingham have a legal and equitable interest, as respectively stated, in said property and in any taxes assessed or levied thereupon during the tax years 1950 and 1951, and, further, Libby, in the sale by it to said Railway of such of said personal property as it owned during said tax year 1950, as well as in the transfer to said Bellingham of the capital stock formerly owned by Libby in said Railway, agreed that it would pay such if any of the City's municipal taxes as might be finally judicially decreed to be unpaid and delinquent against said real property and personal property for the tax year 1950.

Objectors Railway, Libby, and Bellingham, if any or all of said real and personal property is intended to be designated in the statement, reading:

“Delinquent Tax Rolls for the Years 1950 and 1951,
Delinquent from Sept. 15th of Said Years:

“Lot, Block and Description and to Whom Assessed
if Known:

Bellingham Can Co. Land, \$11,000;
Frame Bldgs., \$176,625; Personal,
\$94,000:

| | |
|----------------|------------|
| Tax 1950 | \$2,021.20 |
| 1951 | 1,639.65 |
| Penalty | 366.09 |
| Interest | 633.54 |
| Total | 4,690.48” |

in the City's Notice of Delinquent Taxes in the City of Yakutat, Alaska, object to and contest the validity of the assessment and tax on said real and personal property for the tax years 1950 and 1951 and to the granting of an order of sale for said property, or any part thereof, because:

1. City's Board of Trustees did not designate the assessor or any other officer of City to post any notice of the presentation of said delinquent tax roll to this court.

2. The City Clerk did not publish in a daily or weekly newspaper published and printed in the City of Juneau, Alaska, or elsewhere, or post in three conspicuous places within the City of Yakutat, or at all, as required by Section 10 of Ordinance No. 1, entitled "An Ordinance to Provide for the assessment, levy and collection of taxes, and for the sale of property, both real and personal, for the payment of taxes, penalties, interest and costs," approved by the Board of Trustees of the City of Yakutat, Alaska, on July 3, 1948, a notice that the Board of Trustees had fixed the rate of tax levy for either of said tax years 1950 or 1951, designating the number of mills fixed on each dollar of assessed value of the property assessed, and that the taxes were then due and would be delinquent on or before the 15th day of September of either said tax years 1950 or 1951, and that penalty and interest would be charged, and that penalty and interest would be charged as provided in said Ordinance.

nance, and the time when and place where payment of taxes might be made, and the amount of discount which would be allowed for payment in full on or before the date specified in said Ordinance.

3. City's Board of Trustees did not designate either the place where or the date when said delinquent tax roll would be presented to this Court.

4. City's Board of Trustees did not in any manner direct the time when said delinquent tax roll should be made up.

5. The City during each of said tax years 1950 and 1951 made its purported assessment and levy of taxes in a lump sum upon both real and personal property without segregation of either or both the items of real and personal property, or, notwithstanding it had knowledge thereof, of the respective several ownerships of Objectors in said property, and notwithstanding it knew Railway was the sole owner of said real property.

6. This proceedings purportedly is instituted under the provisions of Sections 16-1-121 through 16-1-130, ACLA 1949, which do not apply to personal property, but nevertheless both real and personal property and purported taxes thereon are embraced in said roll.

7. City seeks hereby to obtain an order of sale for both real and personal property, intermingled, without segregation thereof, to enforce a purported tax lien thereupon and to collect lump sum taxes,

penalties, and interest, for both the tax years 1950 and 1951, also without segregation of penalties and interest as to those two years and without segregation of the taxes either as to real property and personal property or as to the several individual ownerships by the Objectors of the property as hereinbefore stated, and said delinquent tax roll and said notice embrace, intermingle and commingle, without separate itemization of either, both real and personal property, and said notice states in substance that judgment and order of sale will be applied for to include both real and personal property, and the Court cannot either make such segregation or prorate the alleged delinquent taxes, penalties or interest either to the respective Objectors or to the respective parcels of real and personal property for the purpose of decreeing a tax lien upon and order of sale of said real property, or otherwise, and a tax lien upon or order of sale of personal property to satisfy a tax lien thereupon cannot be had herein in view of the provisions of said Sections 16-1-121 through 16-1-130, *supra*, and the Court cannot segregate the respective taxes, penalty and interest claimed to be delinquent upon the real property and upon the personal property.

8. The delinquent tax roll purports to assess all taxes, penalty, and interest to Bellingham for both tax years 1950 and 1951, notwithstanding the City well knew that Bellingham neither did nor does own the real property but only owned a part of the

personal property since May 2, 1951, and that Libby owned a part of the personal property in the tax year 1950, and that Railway owned all of the real property and part of the personal property in both tax years 1950 and 1951, and notwithstanding Section 16-1-122, *supra*, requires each tract of land shall be assessed to the known owner, and, if the owner is unknown, shall so state.

9. Neither City's clerk nor any other of its officers, within 10 days after the posting of said notice, or at all, mailed to Bellingham, to whom the real property by said delinquent tax roll purportedly is assessed and whose last known and present address is and was well known to said Clerk and City to be Yakutat, Alaska, or to either Railway or Libby, although both of their last known and present addresses are and were well known to said Clerk and City, as required by the last paragraph of Section 16-1-122, *supra*, or otherwise, notwithstanding neither City nor any of its officers published said notice in any newspaper whatsoever, and that neither City, its Clerk, nor other officer posted said notice at four conspicuous places in the City as required by Section 16-1-122, *supra*, notwithstanding said notice was not published in any newspaper.

10. Objectors state that they are informed and believe and therefore allege that City appointed no assessor and that no person took an oath as assessor, nor was any assessment actually made for either of said tax years 1950 or 1951, but that the

assessment for each of those years, notwithstanding changes had been made in said property, its quantity and character, since June 1, 1949, and notwithstanding changes had also been made in said property, its quantity, character and ownership after June 1, 1950, and prior to June 1, 1951, was in substance and effect no more than an adoption of City's lump sum assessment for the tax year, commencing June 1, 1948, of \$281,685.00 for Railway's real property and Railway's and Libby's severally owned personal property then situated in said City, namely: for said tax year of 1950 taxes in the lump sum of \$281,125.00 for Railway's real property and Railway's and Libby's severally owned personal property then situated in said City, and for said year of 1951 taxes in the lump sum of \$281,625.00 for Railway's real property and Railway's and Bellingham's severally owned personal property then situated in said City, and was not based upon any evidence but to the contrary ignored the evidence that Railway's real property for each of the tax years 1950 and 1951 was of the true and full value of \$99,000.00 and its personal property for each of said tax year of the true and full value of \$7,200.00, and that Libby's personal property for said tax year of 1950 was of the true and full value of \$49,100.00, and that Bellingham's personal property for said tax year of 1951 was of the true and full value of \$76,603.00; that said delinquent tax roll does not segregate the respective assessments for said tax years 1950 and 1951 or state whether the purported as-

sessments therein refer to one, if so which one, or to both of said tax years, and does not describe either the real property or the personal property that is purported to be assessed.

11. City's purported assessments for each of said tax years 1950 and 1951 are not based upon evidence but were made in bad faith and not upon the true and full value of said respective properties and without their being equalized in accordance with valuations and similarly in method to valuations assessed against other properties of other property owners, or at all, but disproportionately high compared to valuations placed upon other taxpayers' properties, and without City's Board of Trustees in good faith sitting (nor, in 1950, at all), as a board of equalization and in good faith listening to, considering the evidence, equalizing and adjusting Objectors' complaints of the invalidity and unjustness in accordance with Section 6 of said City's Ordinance No. 1, *supra*, or otherwise, and in utter disregard that said properties, as City and its Board of Trustees and other officers well knew, are only valuable for the special use of a salmon cannery and were not so operated during the fishing season of 1950, and said purported assessments are and were fraudulent in that they were purposely made too high and excessive, i.e.: for the tax year 1950 by \$125,825.00 over the combined true and full value of said property and for the tax year 1951 by \$98,822.00 over the combined true and full value

of said properties, with a view of casting an undue proportion of the public burdens on these Objectors and were made in pursuance to rules of valuation, in utter disregard of the evidence, that were designed to operate unequally in the distribution of City's municipal taxation and to discriminate against these objectors, and purposely to impose upon them more than their respective just proportion of the public burden.

12. The combined true and full value of Railway's real and personal property and of Libby's personal property then situated in the City for the tax year 1950 was \$155,300.00, and the City's purported assessment of that property at \$281,125.00 is excessive by \$125,825.00; that on February 2, 1951, Libby on behalf of Railway paid to City \$1,699.20 in full payment of said 1950 taxes computed at the levy rate of 16 mills upon the true and full value of Railway's real property of \$99,000.00 and of personal property of \$7,200.00, and on behalf of itself \$785.60 in full payment of said 1950 taxes on Libby's personal property computed at the levy rate of 16 mills upon the true and full value of its personal property of \$49,100.00; that, notwithstanding the City, its trustees and Treasurer knew that said payments were so made, the City retained said payments for its own benefit and has never returned or offered to return any part thereof.

13. The combined true and full value of Railway's real and personal property and of Belling-

ham's personal property then situated in the City for the tax year 1951 was \$182,803.00, and that the City's purported assessment of that property at \$281,625.00 is excessive by \$98,822.00; that on or about December 7, 1951, Bellingham on behalf of Railway paid to City in full payment of said 1951 taxes \$1,665.22 computed at the levy rate of 16 mills upon the true and full value of Railway's real property of \$99,000.00 and personal property of \$7,200.00 and on behalf of itself \$1,201.13 computed at the levy rate of 16 mills upon the true and full value of its personal property of \$76,603.00; that in computing said payments a 2% discount was taken for payment in full before they became delinquent; that, notwithstanding City, its trustees and its treasurer knew that said payments were so made, the City retained said payments for its own benefit and has never returned or offered to return any part thereof.

Wherefore Objectors pray that the City's application for judgment and order of sale may be denied, and that Objectors may be given sufficient time to adduce evidence in support of these Objections, and that all of the City's records pertaining to municipal taxation for the tax years 1950 and 1951 may be immediately impounded in the custody of the Clerk of the Court, and that a day certain may be set for the hearing of these Objections so that Objectors may have opportunity to produce its evidence both orally and by deposition, and that no hearing may be had upon the City's application in the meantime.

Dated at Juneau, Alaska, September 8, 1952.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 8, 1952.

Robertson, Monagle & Eastaugh
Attorneys at Law

September 8, 1952.

Honorable George W. Folta,
Judge of the District Court,
P. O. Box 1721,
Juneau, Alaska.

Dear Judge:

Recently I learned that the City of Yakutat intended on the 9th instant to present a purported delinquent tax roll for the years 1950 and 1951. No specific time of such presentation other than the date was given, and as yet neither the delinquent tax roll nor an application for judgment and order of sale has been filed with the Clerk of the District Court.

The statute makes no specific provision by which objectors can file their objections in advance.

Today I have served upon William L. Paul, Jr., attorney for the City of Yakutat, and deposited with the Clerk the objections of Yakutat & South-

ern Railway, Libby, McNeill & Libby, and Bellingham Canning Company to these contemplated proceedings.

My clients desire a hearing at which they can produce their evidence, but some little time will be required to obtain the evidence, both orally and by deposition, so I request that no hearing be held at the present time or without first giving me at least two or three weeks advance notice because I doubtless will have to take depositions in Chicago; but I know of no procedure by which I could do so before the application and delinquent tax roll are filed with the Clerk.

I am giving Mr. Paul a copy of this letter and am also submitting a copy of it to the Clerk with the original objections.

Yours very truly,

R. E. ROBERTSON,
Attorney-at-Law,
Juneau, Alaska.

RER:er

CC w/encl: Clerk of the District Court
William L. Paul, Jr., 9/8/1952.

To the Clerk: Will you please file this in the case when Paul files his application or delinquent tax roll. So it will be officially filed, I enclose filing fee of 25 cents cash.

/s/ R. E. ROBERTSON.

[Title of District Court and Cause.]

APPLICATION

Your applicant, the City of Yakutat, respectfully submits the attached duplicate delinquent tax rolls for the City of Yakutat for the years 1950 and 1951, which clearly show the various parcels of property within the territorial limits of said city, on which taxes were duly and regularly levied but not collected and which taxes are unpaid for the years 1950 and 1951. Said duplicate delinquent tax rolls also show the names of the owners or reputed owners of each parcel, the amount of taxes levied, unpaid and due for each such parcel or tract for said years, the penalties and interest as provided by the ordinance of the said City and by law due on each of said parcels.

Notice of this application for order of sale was duly posted. Applicant is a second class city of less than one thousand five hundred population, and has no newspaper.

Wherefore, your applicant prays that an order issue that each of said parcels and tracts be sold at public auction in the manner prescribed by law to satisfy and discharge the lien of taxes, penalties, interest and costs; that the court make an order directing said payments to be made; and such further order as is meet in the premises.

Application October 15, 1952.

/s/ WILLIAM L. PAUL, JR.,

Attorney for the City of
Yakutat.

PLAINTIFF'S EXHIBIT No. 1

Notice of Delinquent Taxes on Real Property in the
City of Yakutat, Alaska

To Whom It May Concern:

Notice is hereby given that the delinquent tax roll of real property and personal property for the City of Yakutat, Alaska, for the years 1950 and 1951 has been completed and is now open for public inspection at the office of the City Clerk and that same will be presented to the District Court of the Territory of Alaska, Division No. 1, at Juneau on the 9th day of Sept., 1952, or as soon thereafter as the same can be heard for judgment of order and sale.

The following list shows the tracts as shown by said delinquent tax roll, the amount of tax, interest, penalty and to whom assessed:

“Delinquent Tax Rolls for the Years 1950 and 1951,
Delinquent from Sept. 15th of Said Years:

“Lot, Block and Description and to Whom Assessed
If Known:

Bellingham Can Co. Land, \$11,000;
Frame Bldgs., \$176,625; Personal,
\$94,000:

| | |
|----------------|------------|
| Tax 1950 | \$2,021.20 |
| 1951 | 1,639.65 |
| Penalty | 366.09 |
| Interest | 633.54 |

Total\$4,690.48”

Received in Evidence: May 10, 1954.

Certificate of Delinquent Tax Roll

I, John G. Williams, Jr., Clerk of the City of Yakutat, Alaska, do hereby certify that the foregoing roll is a true and correct roll of the delinquent real property taxes of said City, for the years therein set forth, except

American Can Co. property valuations being in the process of being made.

and that all of said taxes are due and that they respectively became delinquent the respective dates as in said roll stated, and that the total amount of delinquent taxes, interest and penalty, together with the aggregate of the whole thereof assessed against each separate tract and property for each of said years for which the taxes assessed against each tract and property are due and delinquent are shown in the foregoing roll, together with the total of all such past due and delinquent taxes, interest and penalty, separately stated and the aggregate of the whole thereof; that no part of said taxes, interest or penalty have been paid.

During the time of publication and notice and up to the time of the order of sale referred to any person may appear and make payment on any piece or tract of property set forth herein, together with the penalty and interest and the Clerk or other officer shall make proper notice of such payment on both the original and duplicate delinquent tax roll.

In Witness Whereof I have hereunto set my

hand and the corporate seal of said City this 9th day of August, 1952, at Yakutat, Alaska.

/s/ JOHN G. WILLIAMS, JR.,
City Clerk.

[Endorsed]: Filed October 15, 1952.

[Title of District Court and Cause.]

NOTICE OF TAKING OF DEPOSITIONS
UNDER RULE 30

To the Applicant City of Yakutat, Alaska, and Its
Attorney William L. Paul, Jr.:

You are hereby notified that the Objectors Yakutat & Southern Railway, Libby, McNeill & Libby, and Bellingham Canning Company, will take the depositions, upon oral examination, of the following persons at the respective times and places mentioned, namely: Jeanice M. Walton, business name Jeanice M. Welsh; Robert Welsh; and M. C. Bristol, in the office of the Icy Straits Salmon Company, 219 Herald Building, Bellingham, Washington, at 10:00 o'clock a.m., on November 20, 1952; H. G. Heaton in the offices of Attorneys Holman, Mickelwait, Marion, Black & Perkins, 1006 Hoge Building, Seattle, Washington, at 10:00 o'clock a.m., on November 21, 1952.

Each of said depositions will be taken before a disinterested Notary Public who is not a relative, employee, attorney or counsel of any of the parties

or of said witnesses, nor a relative or employee of such attorney or counsel, nor financially interested in this proceedings, and said testimony will be taken stenographically before a disinterested court reporter or stenographer.

Service of this notice is made upon you by mailing a copy thereof on this date in a sealed envelope, postage prepaid, addressed to Attorney William L. Paul, Jr., Post Office Box 81, Juneau, Alaska.

Hereof take due notice.

Dated at Juneau, Alaska, November 5, 1952.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

[Endorsed]: Filed November 6, 1952.

[Title of District Court and Cause.]

ORDER

The application of the City of Yakutat for an order of sale of real property on which taxes are delinquent for the years 1950 and 1951 having been heretofore made, and such application now coming before the Court for said order concerning those tracts and parcels of realty about which no objections have been filed, namely, all tracts and parcels except those of Libby, McNeill & Libby, Yakutat and Southern Railway, and Bellingham Canning Co.; and it appearing satisfactorily to the Court that

the Clerk of applicant made up the duplicate delinquent tax rolls for the said years, he being the person so authorized to do and duly posted the same within the provisions of Section 16-1-123 ACLA 1949, with notices to the delinquent taxpayers, with notice of the presentation of said rolls to this Court on September 9, 1952, for order of sale of real property described on said rolls, and good cause appearing in the premises, it is——

Ordered that the real property described in said rolls, except that of Libby, McNeill & Libby, Yakutat & Southern Railway, and Bellingham Canning Co., be sold at public auction at the City Hall (akn ANB Hall), in the City of Yakutat, Alaska, in the manner prescribed by law, commencing at the hour of 10 a.m., December 12, 1952, between the hours of 10 a.m. and 4 p.m., after 30 days' notice of such sale; nevertheless exempting from such sale such tracts and parcels for which taxes, penalty, interest and costs have been paid prior thereto; and applicant's costs herein to be taxed by the Clerk of this Court including an attorney's fee of \$250.00.

Done at Ketchikan, Alaska, this November 7th, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed November 7, 1952.

[Title of District Court and Cause.]

MINUTE ORDER FRIDAY, NOVEMBER 7, 1952

There appeared Wm. L. Paul, Jr., who presented to the court, and Order for the Sale of Real Property in the City of Yakutat, for delinquent taxes. Said order did not run as to those properties on which R. E. Robertson, Attorney for protestants, had filed a protest. With the court being fully informed the said order was signed with an attorney fee of \$250 being allowed.

[Title of District Court and Cause.]

MINUTE ORDERS IN No. 6734-A

Minute Order Dated Friday, Nov. 7, 1952, as entered in Journal No. 21, Page 33

There appeared William L. Paul, Jr., who presented to the court, an Order for the Sale of Real Property in the City of Yakutat, for delinquent taxes. Said Order did not run as those properties on which R. E. Robertson, Attorney for protestants, had filed a protest. With the Court being fully informed the said order was signed with an attorney fee of \$250 being allowed.

Minute Order Dated Friday, December 19, 1952, as entered in Journal No. 21, Page 65

This case came on for hearing of objectors' Motion for Production of Documents. William L. Paul, Jr., for City of Yakutat; R. E. Robertson for

Objectors. After argument of counsel, the Court granted the motion. Objectors offered to pay the transportation expense of the records.

Minute Order Dated Monday, December 22, 1952, as entered in Journal No. 21, Page 68.

This case was called up by the Objectors for setting down for hearing, their Motion for Default of the Applicant for failure to Answer Interrogatories, and also on an application of the Applicant for an extension of time in which to answer the Objectors Interrogatories. William L. Paul, Jr., for Applicant; R. E. Robertson for Objectors. Mr. Paul stated that he had filed and served Applicant's Answers to the Interrogatories this morning. Mr. Robertson still wished to argue his motion for entry of default, so the matter was set for December 29th.

Minute Order Dated Monday, December 29, 1952, as entered in Journal No. 21, Page 80

This case came before the court for hearing on Objectors' Motion for entry of Judgment by Default, on Petitioner's Motion for an Extension of Time to answer Interrogatories and on Objectors' Motion to Strike motion for extension and to strike Petitioner's answers to Objectors' Request for Admission. William L. Paul, Jr., for Petitioner; R. E. Robertson for Objectors. Counsel presented their arguments and the matter was taken under advisement.

Later this day the court ruled as follows: Objectors' motions for default and to strike are denied.

Treating Petitioner's motion for Extension of Time as a Motion to allow filing of Answers to Interrogatories. Motion is granted.

Minute Order Dated March 27, 1953, as entered in Journal No. 21, Page 118

This matter came before the court for argument on Objectors' Motion to suppress Applicant's answers to Objectors' Interrogatories. William L. Paul, Jr., for Applicants; R. E. Robertson for Objectors. The motion was sustained except as to Answer No. 4. Respondent was granted 2 weeks to respond with proper answers.

Minute Order Dated Friday, April 23, 1954, as entered in Journal No. 21, Page 428

Upon the calling up of this case for hearing on a Motion to set for trial, and a Motion for Judgment on Pleadings, Mr. Paul moved for this case to be set over and a day set for hearing, Mr. Robertson concurred. It was set for hearing on Wednesday, April 28th.

Minute Order Dated Wednesday, April 28, 1954, as entered in Journal No. 21, Page 434

This case came before the court for hearing on a Motion to Set for Trial and for Motion for Summary Judgment. Wm. L. Paul, Jr., for Applicants; R. E. Robertson for Protestants. Counsel presented their arguments following which the court took the matter under advisement. In Cause No. 6581-A the Court set Mr. Robertson's Motion for Judgment on the Mandate for hearing on the next Motion Day.

Minute Order Dated Friday, April 30, 1954, as entered in Journal No. 21, Page 438

The Court having heard counsels' arguments on the Motions herein, at this time ruled that said motions for Judgment would be denied.

Minute Order Dated Tuesday, May 10, 1954, as entered in Journal No. 21, Page 445

This matter came on for trial before the Court. Wm. L. Paul, Jr., appeared for Petitioner, City of Yakutat. R. E. Robertson appeared for Objectors Libby, McNeil & Libby, Yakutat & Southern Ry. and Bellingham Canning Co. Petitioner proceeded by calling Dorothy Henry, City Clerk of Yakutat, who was sworn. The Duplicate Delinquent Tax Roll for the City of Yakutat for the years 1950 and 1951 was offered in evidence to which Mr. Robertson objected. After argument it was admitted in evidence as subject to the objection. Page 5 of the Assessment Book was admitted as Exhibit 2, with leave to substitute a photostatic copy in lieu of the original page. Petitioners stipulated that Protestants' objections, Nos. 1, 3, 4, and 9 were admitted. Edward G. Johnson's Amended Answers to interrogatories dated Nov. 21, 1952, were admitted in evidence. Counsel stipulated that Objectors' witnesses would testify that the value of the properties of the objectors hereto would be the same as reflected by paragraph 10 of the objections. It was stipulated that as of June 1, 1950, Bellingham Canning Company did not own any property subject to tax, in Yakutat, and that its interest was acquired May 5,

1951. It was also stipulated that at the time of purchase, the Bellingham Canning Company paid \$120,000 to Libby, McNeil & Libby for all the physical assets in the City of Yakutat. It was stipulated that Answer to objection Request for admission of Nos. 22, 23, 24, 25, and 26 were admitted in evidence. Upon the completion of the examination of the witness Dorothy Henry, Petitioner rested. Mr. Robertson moved, in behalf of the Objectors, for dismissal of Petitioner's case. Ruling was reserved.

Minute Order Made on Wednesday, June 16, 1954,
as entered in Journal No. 21, Page 456

At this time the Court signed a Memorandum Decision in this case.

Minute Order Made on Thursday, June 24, 1954, as
entered in Journal No. 21, Page 462

At this time this matter came on for hearing. William L. Paul, Jr., was present for Plaintiff; R. E. Robertson for Objectors. Mr. Robertson filed Objections to Findings of Fact, Conclusions of Law, Order of Sale and Cost Bill. After discussion, Mr. Paul asked the Court for time until 2 p.m., to submit authorities on Objections, which the Court granted.

Minute Order Made on Friday, June 25, 1954, as
entered in Journal No. 21, Page 463

This matter having been heard yesterday on Objections to Findings of Fact, Conclusions of Law,

Order of Sale, and Cost Bill filed by R. E. Robertson, the Court ruled that the objections of the taxpayers to the allowance of interest on penalties and of a fee to the City Clerk, are sustained and all other objections are overruled.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the .. day of November, 1952, against certain tracts and parcels of property at Yakutat the clerk is requested to tax the following as costs:

| | |
|--|----------|
| Fees of the Clerk..... | \$ 21.00 |
| Applicant's attorney's fees allowed by Court | 250.00 |
| Cost of posting notices of hearing..... | 3.00 |
| <hr/> | |
| Total | \$274.00 |

United States of America,
Territory of Alaska—ss.

I, William L. Paul, Jr., do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to with postage fully prepaid thereon.

/s/ WILLIAM L. PAUL, JR.,
Attorney for Applicant.

Subscribed and sworn to before me this 10th day of November, A.D. 1952, at Ketchikan, Alaska.

[Seal] /s/ IRENE R. ERICKSON,
Deputy Clerk.

Costs are hereby taxed in the amount of \$274.00 this 10th day of November, 1952, and that amount included in the judgment.

[Seal] J. W. LEIVERS,
Clerk;

By /s/ IRENE R. ERICKSON,
Deputy Clerk.

[Endorsed]: Filed November 10, 1952.

[Title of District Court and Cause.]

OBJECTORS' REQUEST UNDER RULE 36
FOR ADMISSIONS BY APPLICANT

Objectors Yakutat & Southern Railway, Libby, McNeill & Libby, and Bellingham Canning Company request applicant The City of Yakutat, Alaska, within ten days after service of this request to admit, for the purpose of this proceedings only and subject to all pertinent objections to admissibility which may be interposed at the hearing, that each of the following statements is true:

1. The official minutes and record book of applicant's Board of Trustees and Board of Equalization commencing with and including October 2,

1948, and running through and including October 6, 1952, do not show or state that any assessor was appointed for the tax year commencing June 1, 1950.

2. The official minutes and record book of applicant's Board of Trustees and Board of Equalization commencing with and including October 2, 1948, and running through and including October 6, 1952, do not show or state that any assessor was appointed for the tax year commencing June 1, 1951.

3. The official minute and record book of applicant's Board of Trustees and Board of Equalization, commencing with and including October 2, 1948, and running through and including October 6, 1952, do not show or state that any person ever took an oath of office as assessor.

4. The only entries or statements, substantially or verbatim, relative to or mentioning an assessor entered or appearing in the official minutes and record book of applicant's Board of Trustees and Board of Equalization, commencing with and including October 2, 1948, and running through and including October 6, 1952, are the following:

a. Page 56, dated October 11, 1948: Telegram from Libby's attorney, Mr. R. E. Robertson, was read at this meeting. The telegram was in protest of the Libby's property valuation as set by the assessor.

b. Pages 63-64, dated March 12, 1949: The Mayor explain about Libby's property tax situation. Mayor ask the Board of Trustees if they wish to hire expert city assessor from Juneau to assess the property of Libby, McNeill, if Libby fail to pay the balance of tax which they owe to the City of Yakutat, by March 15, 1949. Those that voted in favor of bringing up a qualified assessor were, Mr. Ben Peterson, Harry Bremner, Sr., Mrs. Esther Bremner, Mrs. Helen Bremner, Mr. John Ellis and Mr. J. B. Mallott.

A Resolution to authorize \$350.00 and not over is proposed for the expense of the assessor. (Resolution No. 16.) The entire five members of the Board of Trustees voted in favor of the proposed resolution number 16.

c. Page 72, undated: Assessor was advised to assess the property of Mr. and Mrs. Simons.

d. Page 80, undated: The assessor, Mr. Sheldon James, Jr.

e. Pages 91-92, dated June 6, 1950: It was moved and seconded to accept David Abraham as City Assessor. Motion was carried.

f. Page 100, dated November 3, 1950: Before Mayor and Trustee Mrs. Simons was present and made protest, value set on buildings and personal property by assessor out of reason * * *

g. Pages 101-104, dated Nov. 6, 1950: John Williams to act as assessor until removed from office, appointed by City Mayor.

h. Pages 104-106, dated Nov. 7, 1950: Edward Rener says he transferred property to Melvin Rener, also that he had told the former assessor Mr. Hamilton of this change.

5. The only entries or statements mentioning or relative to assessment of taxes against property of either Bellingham Canning Company, Yakutat & Southern Railway, or Libby, McNeill & Libby, entered or appearing in the official minutes and record book of applicant's Board of Trustees and Board of Equalization, commencing with and including October 2, 1948, and running through and including October 6, 1952, are the following:

a. Page 56, dated October 11, 1948: Telegram from Libby's attorney, Mr. R. E. Robertson, was read at this meeting. The Telegram was in protest of the Libby's property valuation as set by the assessor.

b. Pages 63-64, dated March 12, 1949: The Mayor explain about the Libby's property tax situation. Mayor ask the Board of Trustees if they wish to hire expert city assessor from Juneau to assess the property of Libby, McNeill, if Libby fail to pay the balance of tax which they owe to the City of Yakutat, by March 15, 1949. Those that voted in favor of bringing up a qualified assessor were: Mr. Ben Peterson, Harry Bremner, Sr., Mrs. Esther Bremner, Mrs. Helen Bremner, Mr. John Ellis and Mr. J. B. Mallott.

A Resolution to authorize \$350.00 and not over is proposed for the expense of the assessor. (Resolu-

tion No. 16.) The entire five members of the Board of Trustees voted in favor of the proposed resolution number 16.

c. Pages 85-86, dated April 6, 1950: A letter concerning Libby's city tax question was also read.

Herbert Bremner moved that the City Board of Trustees authorize Mr. William L. Paul, Jr., City Attorney, to proceed in court action entitled: "City versus Libby, McNeill & Libby." Motion was seconded by Ben Peterson. Motion was carried with the following members voting yes: Ben Peterson, John Ellis, Helen Bremner, Esther Bremner, Jack Ellis and Herbert Bremner. There was no contrary vote.

Herbert Bremner moved that we pay City Attorney William L. Paul, Jr., on a flat rate basis of 12 per cent of principal and interest and penalty plus attorney's fee allowed by the court. Seconded by Mr. Ben Peterson. Motion carried unanimously.

John Ellis moved that the City Treasurer be authorized to pay the \$21.00 to file in court and Marshal's fee of \$3.10. Motion was seconded by Ben Peterson. Motion carried.

d. Pages 133-137, dated Feb. 6, 1951: Mayor read letter from Robertson, attorney for Libby, McNeill & Libby, the contents of letter in part from Robertson as follows: Two checks made out for taxes for 1950 for Libby, McNeill & Libby. These checks (No. 64131 University Branch, No. 64130 Nat'l Bank of Commerce dated 1/30/51, one for

\$785.60, one \$1,699.25), were indorsed for deposit only in the First National Bank by Mayor Mallott and sent to William Paul, Jr., to be photographed.

e. Pages 143-146, dated April 30, 1951: Next order of business is a letter written from William Paul, Jr., pertaining to the case of City of Yakutat versus Libby, McNeill & Libby.

Discussion taken on the question "City of Yakutat versus Libby's," sending of a witness to testify on behalf of the City.

J. B. Mallott authorized to take records of City of Yakutat to appear as a witness on behalf of City.

Witness granted \$13.00 per day for five days, \$68.10 for fare and cab service.

f. Pages 147-150, dated June 4, 1951. Judge Folta hasn't rendered a decision on the court case of City of Yakutat vs. Libby's.

Letters have been read by the Mayor. Public Works, Assessing Bellingham property.

g. Pages 157-159, dated October 8, 1951, Mayor reads communication from William L. Paul, Jr., about the tax case of Yakutat vs. Libby, McNeill & Libby.

h. Pages 162-163, dated October 30, 1951: Bellingham Canning Co. has been opened for discussion. With Mr. Bristol & Mrs. Welsh present.

Mr. Bristol asks the Board what the value is—What Felix Toner says? Or what the real value is?

Store inv. \$42,235.00. Stock Room inventory \$35,568.00 as given by Mr. Bristol. Mrs. Welsh presented to the Board \$125,000.00 for Yakutat & Southern Railway and \$77,803.00 for inventory of the Store & Stockroom. Out of the \$125,000.00 there is \$25,000.00 which is outside of the city limit of Yakutat and is non-taxable.

This is the true value as stated by Mrs. Welsh and Mr. Bristol of Bellingham Canning Co. But this does not include a light plant—second hand, a value of \$5,000.00 as given by Mrs. Welsh. Increasing the value of Bellingham to \$182,803.00.

Bellingham Canning Co. presents \$182,803.00 for their property as a starting point for this tax roll for this year and next year there may be improvement added. It has been stated by Bellingham that it is their wish to come to a fair value on their property and to stay out of court action.

It is up to the Board of Equalization on whether to accept the true value on Bellingham Canning Co.'s property as presented by Mrs. Welsh and Mr. Bristol.

i. Pages 164-165, dated Nov. 12, 1951. The Board next takes up Bellingham Canning Property. Discussion taken on Bellingham Canning Co.

It has been brought out that this case against the property of Bellingham Canning Co., which was formerly owned by Libby's is already in court and whatever the judges decide on this case will be

final. The Board decided that the property on Bellingham Canning Co., remains the same as set in the two last years, at \$281,625.00, as follows: Land, \$11,000.00; \$176,125.00 for buildings; \$94,000.00 for personal.

j. Pages 184-187, dated April 7, 1952: Bellingham will not sell any surplus electricity to the U. B. The city has taxed Bellingham property unjustly.

Councilman Whiting stated his view on the above question as follows: It is just like baiting a dog with a hunk of meat, they seem to be trying to have the city lower their taxes, but which can't be done.

Mayor Mallott presents more information on electricity and taxes on cannery. We haven't assessed Bellingham on their cannery machinery, which \$75 thousand per line.

k. Pages 198-200, dated Oct. 3, 1952: Be it resolved that the Mayor and city attorney that settlement on the property valuation and taxes for the years of 1950-51-52 on this basis the difference in valuation between the city and Co. be split, plus that Bellingham at its own expense employ American Appraiser Co. or some other company to appraise the entire plant and that the appraisal for the American Can Co. be fixed at the same figure as for Craig namely 30 thousand per line.

Motion carried.

6. The official minutes of the meeting under date of October 30, 1951, of applicant's Board of Equalization show the following entry:

Bellingham Canning Co. has been opened for discussion. With Mr. Bristol and Mrs. Welsh present.

Mr. Bristol asks the Board what the value is—What Felix Toner says? Or what the real value is?

Store inv. \$42,235.00. Stock Room inventory \$35,568.00 as given by Mr. Bristol. Mrs. Welsh presented to the Board \$125,000.00 for Yakutat & Southern Railway and \$77,803.00 for inventory of the Store & Stockroom. Out of the \$125,000 there is \$25,000.00 which is outside of the city limit of Yakutat and is non-taxable.

This is the true value as stated by Mrs. Welsh and Mr. Bristol of Bellingham Canning Co. But this does not include a light plant—second-hand, a value of \$5,000.00 as given by Mrs. Welsh. Increasing the value of Bellingham to \$182,803.00.

Bellingham Canning Co. presents \$182,803.00 for their property as a starting point for this tax roll for this year and next year there may be improvement added. It has been stated by Bellingham that it is their wish to come to a fair value on their property and to stay out of court action.

It is up to the Board of Equalization on whether to accept the true value on Bellingham Canning Co.'s property as presented by Mrs. Welsh and Mr. Bristol.

7. The official minutes of the meeting under date of November 12, 1951, of applicant's Board of Equalization show the following:

The board next takes up Bellingham Canning property. Discussion taken on Bellingham Canning Co.

It has been brought out that this case against the property of Bellingham Canning Co. which was formerly owned by Libby's is already in court and whatever the Judges decide on this case will be final. The Board decides that the property on Bellingham Canning Co. remains the same as set in the two last years, at \$281,625.00 as follows: Land, \$11,000.00; \$176,125.00 for buildings, \$94,000.00 for personal.

Mill rate remains the same as last year at 16 mills.

8. The official minutes of the meeting under date of April 7, 1952, of applicant's Board of Trustees shows the following:

First order of business is report of the results of meeting with Bellingham for surplus electricity, as given by Mr. Hamilton, a member of the Utilities Board. A maximum of 25 KW for summer and 75 KW for winter. Bellingham to sell to Utility Board with a cut-off at Bellingham. The Utility Board to pay for only what is used. Hamilton reported to the Board of Trustees of a letter received from Bellingham contains in part as follows: Bellingham will not sell any surplus electricity to the U.B. The city has taxed Bellingham property unjustly.

Councilman Whiting stated his view on the above question as follows: It is just like baiting a dog

with a hunk of meat, they seem to be trying to have the city lower their taxes, but which can't be done.

Mayor Mallott presents more information on electricity and taxes on cannery. We haven't assessed Bellingham on their cannery machinery, which \$75 thousand per line.

9. The official minutes of the meeting under date of October 3, 1952, of applicant's Board of Trustees shows the following:

Be it resolved that the Mayor and city attorney that settlement on the property valuation and taxes for the years of 1950-51-52 on this bases the difference in valuation between the city and co. be split, plus that Bellingham at its own expense employ American Appraiser Co. or some other co. to appraise the entire plant and that the appraisal for the American Can Co. be fixed at the same figure as for Craig, namely 30 thousand per line.

Motion carried.

10. Objector Libby, McNeill & Libby closed its Yakutat salmon cannery at the end of the 1948 salmon fishing season and neither the land, the various salmon cannery buildings, equipment nor machinery were used for salmon canning purposes again until the 1951 salmon fishing season.

11. Subsequent to the 1948 salmon fishing season and prior to June 1, 1949, Libby, McNeill & Libby had decided to cease operating a salmon cannery at

Yakutat, and reduced the inventory of its stock and supplies, which reduction was maintained thereafter up and until after January 1, 1951.

12. Subsequent to the 1948 salmon fishing season and prior to June 1, 1949, Libby, McNeill & Libby removed from the town of Yakutat, Alaska, two Star boats, 3 Y boats, skiffs, fishing gear, canning machinery and equipment, a house, 3 bunkhouses, part of the building that had been formerly used as a web room, pipe room and machine shop, and stripped its cannery plant of most of its equipment, and did not return any of said property or similar property to Yakutat until after January 1, 1951.

13. Libby, McNeill & Libby on or about May 3, 1951, sold to the Bellingham Canning Company for the sum of \$120,000.00 all of the former's personal property then situated in the city of Yakutat, Alaska, and transferred to the Bellingham Canning Company all capital stock previously owned by Libby, McNeill & Libby in the Yakutat & Southern Railway, which transfer included the entire Yakutat & Southern Railway railroad system, all of its capital assets, land, railroad trackage, railroad rights-of-way, buildings, and personal property situated both within and without the town of Yakutat, Alaska, and also a tract of land known as U.S. Survey No. 179, consisting of 160 acres and situated entirely outside the boundaries of the City of Yakutat, Alaska, but said sale did not include the inventory of the stock of supplies and in trade on hand for which was paid an additional agreed con-

sideration of \$105,000.00 which included \$9,500.00 of accounts receivable and all supplies and inventory brought into the town of Yakutat, Alaska, after January 1, 1951, by Libby, McNeill & Libby for use during its then intended 1951 salmon cannery operations but which \$105,000.00 was subject to adjustment by check of inventory.

14. Throughout the tax years of 1950 and 1951 the Objector Yakutat & Southern Railway was the owner of the land, known as U.S. Survey No. 2881, situated within the Applicant's municipal boundaries, and of the building and railroad trackage situated on that land and the adjacent, abutting tideland.

15. At no time during either the tax years 1950 and 1951, did Objector Libby, McNeill & Libby own any of the land, known as U.S. Survey No. 2881, or the buildings or railroad trackage situated on that land, within the town of Yakutat.

16. At no time during either the tax years 1950 or 1951, did Objector Bellingham Canning Company own any of the land, known as U.S. Survey No. 2881, or the buildings or railroad trackage situated on that land, within the town of Yakutat.

17. Libby, McNeill & Libby did not own during the tax year 1951 or on June 1, 1951, any personal property situated in Applicant municipality.

18. Bellingham Canning Company did not own on June 1, 1950, or at any time, except from May 3, 1951, to June 30, 1951, during the tax year 1950,

any personal property situated in Applicant municipality.

19. The land, known as U.S. Survey No. 2881, was situated within applicant municipality throughout the tax years 1950 and 1951.

20. Part of the Yakutat & Southern Railway's dock in Yakutat, Alaska, was removed in the fall of 1950 because it was so in need of repairs that it was of no value and was a liability, and had been in need of such repairs since prior to June 1, 1950.

21. Applicant's Ordinance No. 1 was in effect throughout tax years 1950 and 1951.

22. With his letter of February 1, 1951, to applicant's City Clerk, Attorney Robertson, on behalf of Libby, McNeill & Libby and the Yakutat & Southern Railway Company, enclosed Libby, McNeill & Libby's check for \$1699.20 for 1950 taxes on the Yakutat property of the Yakutat & Southern Railway at the rate of 16 mills upon a valuation of \$106,200.00, and Libby, McNeill & Libby's check for \$785.60 for 1950 taxes upon its property at 16 mills upon a valuation of \$49,100.00, which letter reads as follows:

February 1, 1951.

Airmail—Registered

Return Receipt Requested

City Clerk, Yakutat, Alaska

Dear Sir:

Referring to my letter of the 20th ultimo, to which you have not yet replied, relative to the undated

tax bill which was recently received by Libby, McNeill & Libby from you in which was listed the following property and taxes, namely:

| | | |
|------------------|--------------|---------------|
| Land | \$ 11,000.00 | Tax \$ 176.00 |
| Improvements ... | 176,125.00 | 2818.00 |
| Personal | 94,000.00 | 1504.00 |
| <hr/> | | <hr/> |
| Totals..... | \$281,125.00 | \$4498.00 |

Presumably these taxes cover the property of both Libby, McNeill & Libby and the Yakutat & Southern Railway and which you have failed to segregate and tax against the respective property owners for which reason you are hereby notified that my clients contend they are illegal, also that no proper or sufficient, if any, notice was given of the meeting, if any, of your Board of Equalization.

My clients further protest and maintain that these taxes are unreasonably high as compared with taxes levied on other people's property and that the valuations are not the actual fair or cash valuations of their properties; but that the actual fair cash value of Libby, McNeill & Libby's property within your town on June 1, 1950, was \$49,100.00, and of the Yakutat & Southern Railway on that date was \$106,200.00.

I enclose herewith check of Libby, McNeill & Libby in favor of the City of Yakutat for \$1699.20 in full payment of the 1950 taxes on the Yakutat property of the Yakutat & Southern Railway at the rate of 16 mills upon a valuation of \$106,200.00,

and also the check of Libby, McNeill & Libby in favor of the City of Yakutat for \$785.60 in full payment of the tax at 16 mills upon its property at the valuation of \$49,100.00.

These remittances are tendered in full payment of these respective taxes, and you are requested to have your Board of Equalization meet and equalize the valuations upon my clients' respective property as hereinbefore stated and to officially accept these checks in full payment of the 1950 taxes on those properties.

Please bear in mind that these checks are remitted for no other purpose than in full payment of the 1950 municipal taxes upon my clients' respective Yakutat properties.

Yours truly,

R. E. ROBERTSON.

Enclosures

RER:er

23. Applicant received said letter with said two checks on or about February 2, 1951, and thereafter cashed said checks and accepted the proceeds thereof and has never returned the proceeds or any part of the proceeds of said two checks.

24. On February 3, 1951, Attorney Robertson wrote a letter to the Applicant's City Clerk and enclosed therewith Applicant's original tax notice, as stated in said letter, a copy of which letter is as follows:

February 3, 1951.

City Clerk,
Yakutat, Alaska.

Dear Sir:

Supplementing my yesterday's letter by registered mail to you in which I enclosed checks totalling \$2484.80 in payment of taxes on proper valuations of the property of Libby, McNeill & Libby and of the property of the Yakutat & Southern Railway for the tax year 1950: I now enclose your original tax notice, which I mentioned in my yesterday's letter, and ask you to upon acceptance of those two checks, forward it to me after dating and signing it.

Yours very truly,

R. E. ROBERTSON.

Enclosure

RER:er

25. On December 7, 1951, the Bellingham Canning Company wrote a letter to Applicant's Board of Trustees with which it enclosed its check for \$2866.35 for 1951 municipal taxes upon a valuation of \$182,803.00 at 16 mills or a total of \$2924.85, less 2% amounting to \$58.50, leaving \$2866.35, the amount of the check. The following is a copy of said letter:

December 7, 1951.

Board of Trustees

City of Yakutat

Yakutat, Alaska

Gentlemen:

Enclosed you will find our check in the amount of \$2,866.35, in full payment of our 1951 Municipal Taxes, broken down as follows: Valuation of \$182,803.00 @ 16 mills, total of \$2,924.85 less 2% for full payment of taxes before December 15, 1951, amount of \$58.50, leaving balance of \$2,866.35 amount of our check.

As the board will recall, we made a special trip to Yakutat, to meet with your Board of Equalization on October 30th. At that time we laid before your board our honest, true and actual figures, as to costs of property, and also our actual inventory costs figures, which total was \$182,803.00. At this meeting we gave you these figures in all sincerity, and were indeed greatly surprised when we received your valuations placed at \$281,625.00, where or how this was derived at we are unable to understand. Without any doubt the valuation as placed by us, is the actual valuation, and for this reason we have so based our tax payment to you. As we told your board, it will be necessary for you to resort to the courts for any additional amounts you may decide still due you.

At the time that we met with your board, and also on different occasions, we have tried to make

ourselves clear, in that we intend to do all we can to help the City of Yakutat, not only as a city, but also the individual citizens of the town. In return we did expect the city to be fair in their dealings with us, and we are certainly in hopes that the tax matter is not a cridel of the city's dealings with us. On two different occasions we have sent letters to your mayor, but have not even received the courtesy of a reply. Things like this makes it very hard for us to cooperate, even though our desire is to do so.

We are sorry that this matter has come up during the first year of our operation at Yakutat, but do hope, that the City of Yakutat will realize our desire to help. Providing for a Christmas dinner for the people of Yakutat, is certainly indicative of our desire to help and share in the community life of your town.

In closing we sincerely hope that we can all work together for a better community at Yakutat. May we also take this opportunity to wish you and the people of Yakutat, a very happy and joyous holiday season.

Yours very truly,

BELLINGHAM CANNING
COMPANY.

JEANICE M. WELSH.

26. Applicant cashed said check and accepted the proceeds thereof and has never paid or refunded any part of said \$2,866.35.

Dated at Juneau, Alaska, November 20, 1952.

ROBERTSON, MONAGLE &
EASTAUGH.

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed November 21, 1952.

[Title of District Court and Cause.]

INTERROGATORIES P R O P O U N D E D B Y
O B J E C T O R S T O A P P L I C A N T U N D E R
R U L E 33

1. Did Applicant appoint any person as assessor for the tax year 1950? If so, state the name and present address of such person, or, if more than one, the names and present addresses of each person so appointed as assessor.

2. Did such person or, if more than one, each such person, take an oath in writing to honestly, faithfully and impartially perform the duties of the office of assessor?

3. Was such oath, or, if more than one person, such oath of each such person, filed with Applicant's City Clerk? If so, give the date on which each such oath was so filed, and the name and present address of the person before whom each such oath was made and subscribed, and the present location of,

and the name and present address of the present custodian of, each such oath.

4. Did applicant's Board of Trustees or Board of Equalization make the appointment of such person as assessor or, if more than one, each such person as assessor, at a meeting of said Board? If so, state when and where each such meeting was held and whether or not a written record was made of the business transacted at such meeting or meetings including the appointing of such assessor, and in what book, document, or other instrument said written record was entered, and the present location of, and the name and present address of the present custodian of, said record.

5. Did such assessor or assessors inspect the property of Libby, McNeill & Libby and of the Yakutat & Southern Railway, or either of them, during the tax year 1950? If so, state the date or respective dates on which such assessor or respective assessors inspected the property of Libby, McNeill & Libby, and the date or respective dates on which such assessor or respective assessors inspected the property of the Yakutat & Southern Railway.

6. Did such assessor or assessors assess the property of Libby, McNeill & Libby during the tax year 1950? If so, state the date or respective dates on which such assessor or respective assessors assessed the property of Libby, McNeill & Libby, whether any written record was made thereof, where that record is now located, whether the property was

assessed in a lump or by tracts or by parcels, and the respective amount or amounts assessed.

7. Did such assessors or assessor assess the property of Yakutat & Southern Railway during the tax year 1950? If so, state the date or dates on which such assessor or respective assessors assessed the property of Yakutat & Southern Railway, whether any written record was made thereof, where that record is now located, whether the property was assessed in a lump or by tracts or by parcels, and the respective amount or amounts assessed.

8. Did the assessor or, if more than one person was appointed assessor, the assessors make an assessment list for the tax year 1950? If so, state the name or names and the present address or addresses of such assessor or assessors who made either all or any part of that assessment list and identify what part of the assessment list was made by each assessor if there was more than one assessor for the tax year 1950.

9. State the name and present address of the person who subscribed an affidavit to the assessment book for the tax year 1950 and the name and present address of the person before whom that affidavit was made and subscribed and the official position of said affiant, and under or by whose or what official authority or direction he made said affidavit.

10. Where now are the assessment list for 1950 and the assessment book for 1950?

11. Was Libby, McNeill & Libby named in either the assessment list or the assessment book for 1950?

12. Describe the property, if any, that was shown as assessed to Libby, McNeill & Libby for the tax year 1950 in either or both the assessment list and the assessment book for 1950.

13. Was Yakutat & Southern Railway named in either the assessment list or the assessment book for 1950?

14. Describe the property, if any, that was shown as assessed to Yakutat & Southern Railway for the tax year 1950 in either or both the assessment list and the assessment book for 1950.

15. Was Bellingham Canning Company named in either the assessment list or the assessment book for 1950?

16. Describe the property, if any, that was shown as assessed to Bellingham Canning Company for the tax year 1950 in either or both the assessment list and the assessment book for 1950.

17. Did Applicant's Board of Trustees elect to and make the tax assessments for the tax year 1950, or did it appoint an assessor to do so?

18. If Applicant's Board of Trustees or Board of Equalization elected to make and made the tax assessments for the tax year 1950, state on what date or dates they made those assessments, whether any Board meeting or meetings were held for that purpose, the names of the Trustees attending each

such meeting or meetings, the place at which each such meeting was held, whether any written record was made of the business transacted at each such meeting, and the nature of such, if any, written record, and the present location of, and the name or names of the present custodian, of said record.

19. Did Applicant appoint any person as assessor for the tax year 1951? If so, state the name and present address of such person, or, if more than one, the names and present addresses of each such person so appointed as assessor.

20. Did such person or, if more than one, each such person, take an oath in writing to honestly, faithfully and impartially perform the duties of the office of assessor?

21. Was such oath, or, if more than one person, such oath of each such person, filed with Applicant's City Clerk? If so, give the date on which each such oath was so filed, and the name and present address of the person before whom each such oath was made and subscribed, and the present location of, and the name and present address of the present custodian of, each such oath.

22. Did Applicant's Board of Trustees or Board of Equalization make the appointment of such person as assessor or, if more than one, each such person as assessor, at a meeting of said Board? If so, state when and where each such meeting was held and whether or not a written record was made of the business transacted at such meeting or meetings

including the appointment of such assessor, and in what book, document, or other instrument said written record was entered, and the present location of, and the name and present address of the present custodian of, said record.

23. Did such assessor or assessors inspect the property of Bellingham Canning Company and of the Yakutat & Southern Railway, or either of them, during the tax year 1951? If so, state the date or respective dates on which such assessor or respective assessors inspected the property of Bellingham Canning Company, and the date or respective dates on which such assessor or respective assessors inspected the property of the Yakutat & Southern Railway.

24. Did such assessor or assessors assess the property of Bellingham Canning Company during the tax year 1951? If so, state the date or respective dates on which such assessor or respective assessors assessed the property of Bellingham Canning Company, whether any written record was made thereof, where that record is now located, whether the property was assessed in a lump or by tracts or by parcels, and the respective amount or amounts assessed.

25. Did such assessor or assessors assess the property of Yakutat & Southern Railway during the tax year 1951? If so, state the date or dates on which such assessor or respective assessors assessed the property of Yakutat & Southern Railway, whether any written record was made thereof, where

that record is now located, whether the property was assessed in a lump or by tracts or by parcels, and the respective amount or amounts assessed.

26. Did the assessor or, if more than one person was appointed assessor, the assessors make an assessment list for the tax year 1951? If so, state the name or names and the present address or addresses of such assessor or assessors who made either all or any part of that assessment list and identify what part of the assessment list was made by each assessor if there was more than one assessor for the tax year 1951.

27. State the name and present address of the person who subscribed an affidavit to the assessment book for the tax year 1951 and the name and present address of the person before whom that affidavit was made and subscribed and the official position of said affiant, and under or by whose or what official authority or direction he made said affidavit.

28. Where now are the assessment list for 1951 and the assessment book for 1951?

29. Was Bellingham Canning Company named in either the assessment list or the assessment book for 1951?

30. Describe the property, if any, that was shown as assessed to Bellingham Canning Company for the tax year 1951 in either or both the assessment list and the assessment book for 1951.

31. Was Yakutat & Southern Railway named in

either the assessment list or the assessment book for 1951?

32. Describe the property if any, that was shown as assessed to Yakutat & Southern Railway for the tax year 1951 in either or both the assessment list and the assessment book for 1951.

33. Was Libby, McNeill & Libby named in either the assessment list or the assessment book for 1951?

34. Describe the property, if any, that was shown as assessed to Libby, McNeill & Libby for the tax year 1951 in either or both the assessment list and the assessment book for 1951.

35. Did Applicant's Board of Trustees elect to make and make the tax assessments for the tax year 1951, or did it appoint an assessor to do so?

36. If Applicant's Board of Trustees or Board of Equalization elected to make and made the tax assessments for the tax year 1951, state on what date or dates they made those assessments, whether any Board meeting or meetings were held for that purpose, the names of the Trustees attending each such meeting or meetings, the place at which each such meeting was held, whether any written record was made of the business transacted at each such meeting or meetings, and the nature of such, if any, written record and the present location of, and the name or names of the present custodian of, such record.

37. Do the official minutes and record book of Applicant, including the minutes of meetings of its

Board of Trustees and Board of Equalization, commencing with and including October 2, 1948, and running through and including October 6, 1952, contain or show any statements or entries relative to an assessor other than statements or entries, substantially or verbatim, as follows: March 12, 1949: "The Mayor explain about the Libby's property tax situation. Mayor ask the Board of Trustees if they wish to hire expert city assessor from Juneau to assess the property of Libby McNeill, if Libby fail to pay the balance of tax which they owe to the City of Yakutat by March 15, 1949. Those that voted in favor of bring up a qualified assessor were, Mr. Ben Peterson, Harry Bremner, Sr., Mrs. Esther Bremner, Mrs. Helen Bremner, Mr. John Ellis, and Mr. J. B. Mallott. A resolution to authorize \$350.00 and not over is proposed for the expense of the assessor. (Resolution No. 16.) The entire five members of the board of Trustees voted in favor of the proposed resolution number 16."

And without date, at page 72 of the City of Yakutat's record book: "Whiting's valuation return accepted. Assessor was advised to assess the property of Mr. and Mrs. Simons."

And without date, at page 80 of the City of Yakutat's record book: "The assessor Mr. Sheldon James, Jr.,"

and, June 6, 1950: "It was moved and seconded to accept David Abraham as City Assessor. Motion was carried."

and, November 6, 1950: "John Williams to act as assessor until removed from office, appointed by City Mayor."

and, November 7, 1950: "Edward Rener says he transferred property to Melvin Rener, also that he told the former assessor Mr. Hamilton of this change."

38. If you answer Interrogatory No. 37 affirmatively, then state what other entries or statements relative to an assessor are shown, in what they appear or are entered, and their respective dates.

39. Do the official minutes and record book of Applicant, including the minutes of meetings of its Board of Trustees and of its Board of Equalization, commencing with and including October 2, 1948, and running through and including October 6, 1952, contain or show any statements or entries relative to tax assessment of property of Libby, McNeill & Libby, Yakutat & Southern Railway, and Bellingham Canning Company other than statements or entries, substantially or verbatim, as follows:

October 11, 1948: "Telegram from Libby's attorney, Mr. R. E. Robertson, was read at this meeting. The telegram was in protest of the Libby's property valuation as set by the assessor."

March 12, 1949: "The Mayor explain about the Libby's property tax situation. Mayor ask the Board of Trustees if they wish to hire expert city

assessor from Juneau to assess the property of Libby, McNeill, if Libby fail to pay the balance of tax which they owe to the City of Yakutat, by March 15, 1949. Those that voted in favor of bringing up a qualified assessor were, Mr. Ben Peterson, Harry Bremner, Sr., Mrs. Esther Bremner, Mrs. Helen Bremner, Mr. John Ellis and Mr. J. B. Mallott.

“A Resolution to authorize \$350.00 and not over is proposed for the expense of the assessor. (Resolution No. 16.) The entire five members of the Board of Trustees voted in favor of the proposed resolution number 16.”

April 6, 1950: “A letter concerning Libby’s city tax question was also read.

“Herbert Bremner moved that the City Board of Trustees authorize Mr. William L. Paul, Jr., City Attorney, to proceed in court action entitled: ‘City versus Libby, McNeill & Libby.’ Motion was seconded by Ben Peterson. Motion was carried with the following members voting yes: Ben Peterson, John Ellis, Helen Bremner, Esther Bremner, Jack Ellis and Herbert Bremner. There was no contrary vote.

“Herbert Bremner moved that we pay City Attorney William L. Paul, Jr., on a flat rate basis of 12 per cent of principal and interest and penalty plus attorney’s fee allowed by the court. Seconded by Mr. Ben Peterson. Motion carried unanimously.

“John Ellis moved that the City Treasurer be authorized to pay the \$21.00 to file in court and Marshal’s fee of \$3.10. Motion was seconded by Ben Peterson. Motion carried.”

February 6, 1951: “Mayor read letter from Robertson, attorney for Libby, McNeill & Libby, the contents of letter in part from Robertson as follows: Two checks made out for taxes for 1950 for Libby, McNeill & Libby. These checks (#64131 University Branch, #64130 Nat’l Bank of Commerce dated 1/30/51, one for \$785.60, one \$1,699.25) were indorsed for deposit only in the First National Bank by Mayor Mallott and sent to William Paul, Jr., to be photographed.”

April 30, 1951: “Next order of business is a letter written from William Paul, Jr., pertaining to the case of City of Yakutat versus Libby, McNeill & Libby.

“Discussion taken on the question ‘City of Yakutat versus Libby’s’ sending a witness to testify on behalf of the City.

“J. B. Mallott authorized to take records of City of Yakutat to appear as a witness on behalf of City.

“Witness granted \$13.00 per day for five days, \$68.10 for fare and cab service.”

June 4, 1951: “Judge Folta hasn’t rendered a decision on the court case of City of Yakutat vs. Libby’s.

“Letters have been read by the Mayor. Public Works, Assessing Bellingham property.”

October 8, 1951: “Mayor reads communication from William L. Paul, Jr., about the tax case of Yakutat vs. Libby, McNeill & Libby.”

October 30, 1951: “Bellingham Canning Co., has been opened for discussion. With Mr. Bristol & Mrs. Welsh present.

“Mr. Bristol asks the Board what the value is—What Felix Toner says? Or what the real value is?

“Store inv. \$42,235.00. Stock Room inventory \$35,568.00 as given by Mr. Bristol. Mrs. Welsh presented to the Board \$125,000.00 for Yakutat & Southern Railway and \$77,803.00 for inventory of the Store & Stockroom. Out of the \$125,000.00 there is \$25,000.00 which is outside of the city limit of Yakutat and is non-taxable.

“This is the true value as stated by Mrs. Welsh and Mr. Bristol of Bellingham Canning Co. But this does not include a light plant—second hand, a value of \$5,000.00 as given by Mrs. Welsh. Increasing the value of Bellingham to \$182,803.00.

“Bellingham Canning Co. presents \$182,803.00 for their property as a starting point for this tax roll for this year and next year there may be improvement added. It has been stated by Bellingham that it is their wish to come to a fair value on their property and to stay out of court action.

“It is up to the Board of Equalization on whether

to accept the true value on Bellingham Canning Co.'s property as presented by Mrs. Welsh and Mr. Bristol."

November 12, 1951: "The Board next takes up Bellingham Canning property. Discussion taken on Bellingham Canning Co.

"It has been brought out that this case against the property of Bellingham Canning Co., which was formerly owned by Libby's is already in court and whatever the Judges decide on this case will be final. The Board decide that the property on Bellingham Canning Co., remains the same as set in the two last year, at \$281,625.00, as follows: Land \$11,000.00; \$176,125.00 for buildings; \$94,000.00 for personal."

April 7, 1952: "Bellingham will not sell any surplus electricity to the U.B. The city has taxed Bellingham property unjustly.

"Councilman Whiting stated his view on the above question as follows: It is just like baiting a dog with a hunk of meat, they seem to be trying to have the city lower their taxes, but which can't be done.

"Mayor Mallott presents more information on electricity and taxes on cannery. We haven't assessed Bellingham on their cannery machinery, which \$75 thousand per line."

October 3, 1952: "Be it resolved that the Mayor and city attorney that settlement on the property

valuation and taxes for the years of 1950-51-52 on this bases the difference in valuation between the city and Co. be split plus that Bellingham at its own expense employ American Appraisor Co., or some other company to appraise the entire plant and that the appraisal for the American Can Co., be fixed at the same figure as for Craig namely 30 thousand per line.

“Motion carried.”

40. If you answer Interrogatory 39 affirmatively, then state what other statements or entries relative to assessing the property of Libby, McNeill & Libby, Yakutat & Southern Railway, and Bellingham Canning Company, or either of them, are shown, in what they appear or are entered, and their respective dates.

41. Did Applicant's Trustees officially direct its assessor or any other official to post the notice of delinquent taxes on real property in the City of Yakutat, Alaska, which is attached to Applicant's application at the front door of the Yakutat post office and in three other conspicuous, public places in said city for a period of 30 days and officially designate the place where and the date when the application would be made for order of sale?

42. Was said direction given and said designation made at a meeting of Applicant's Board of Trustees or Board of Equalization?

43. Was that direction given and said designation made at the same or at different meetings?

44. State where and when such meeting was held and the names and present addresses of all trustees present at each such meeting.

45. Was a written record kept of the business transacted at each such meeting? If so, in what book, document, or other instrument was that record entered, and state the present location of, and the name and present address of the present custodian of, that record.

46. Did Applicant's Board of Trustees or Board of Equalization officially direct that applicant's application should be presented to this court at Juneau on September 9, 1952, or as soon thereafter as the same could be heard?

47. Was that direction given at a meeting of applicant's Board of Trustees or Board of Equalization? If so, state when and where that meeting was held, and the names and present addresses of all trustees present at that meeting.

48. Was any written record kept of the business transacted at that meeting and the giving or making of such direction? If so, in what book, document, or other instrument was said record entered, and state the present location of, and the name and present address of the present custodian of, that record.

49. State the three conspicuous public places, other than the Yakutat post office, at which applicant's notice of delinquent taxes on real property in the City of Yakutat, Alaska, which is attached to applicant's application, was posted, and

Dated at Juneau, Alaska, November 21, 1952.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed November 21, 1952.

November 22, 1952.

Mr. Fred Paul,
211 Lyon Building,
Seattle, Washington.

Re: Yukutat Delinquent Taxes 1950-51.

My dear Fred:

I have your letter of the 20th reporting that you made a trip to Bellingham in response to the notice and authorization for the taking of the deposition of Mrs. Welsh and her son Robert on November 20, and that the deposition failed to take place because the witnesses were not present.

I talked with Mr. Robertson this noon and he said he had notified Mrs. Welsh and her son Robert of the taking of the deposition but had received no acknowledgment agreeing as to the time and place. Mr. Robertson had not previously notified me of the impossibility of the taking of the deposition.

It is agreeable with the objectors that a reasonable attorney's fee is due for your trip and your actual expenses. From your letter I gather the information that \$50 per day, one day going and one day returning from Bellingham, is reasonable and that your actual expenses amounted to \$11.65 including transportation and long distance telephone calls, making a total of \$111.65. I am sending a carbon copy of this letter to Mr. Robertson as an indication that there is immediately due from his client the sum of \$111.65 which may be made payable directly to you for this work.

Sincerely yours,

WILLIAM L. PAUL, JR.

WLP:k

c.c. R. E. Robertson

J. B. Mallott

Clerk of the Court

Filed November 26, 1952.

[Title of District Court and Cause.]

PETITION

Objectors represent that the official minutes and record book of the applicant's Board of Trustees and Board of Equalization, as well as all other records in any manner relating to the appointing and qualifying of an assessor and to the assessment and levy of any of the taxes for the municipal tax years

1950 and 1951 which are sought by the application herein to be foreclosed as a lien against the property of objectors, or any of them, are material and pertinent at the hearing on said application and should be produced in court; but, applicant, through its city attorney, has notified objectors, through their attorney, that applicant does not intend to produce any of said records at said hearing; that objectors are agreeable to paying and offer to pay the ordinary reasonable cost of transporting all of said records from Yakutat to Juneau and return by air-mail or air express; that at said hearing objectors desire and will need to introduce evidence by several witnesses, some of whom must be brought from the State of Washington and possibly one or more from Yakutat.

Wherefore, Objectors pray that said hearing be set for a definite date sufficiently in advance to permit objectors to have said witnesses in attendance and also to produce all of said records under subpoena duces tecum should the Court not order applicant to produce them at said hearing.

Dated at Juneau, Alaska, this 28th day of November, 1952.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

[Endorsed]: Filed November 28, 1952.

Robertson, Monagle & Eastaugh
Attorneys at Law

Nov. 28, 1952.

Mr. Fred Paul,
Attorney at Law,
211 Lyon Building,
Seattle, Washington.

Re: Yakutat Delinquent Taxes 1950-1951.

Dear Fred:

Referring to your brother Bill's letter to you of the 22nd instant, of which I received a copy this morning: Having made on many occasions the trip from Seattle to Bellingham and return and knowing that a bus runs every hour for most of the hours of the day, and that as I recall the bus only takes about two hours each way to make the trip, I can't possibly agree that it required you two days in making the trip from Seattle to Bellingham to learn that no depositions would be taken on the 20th instant in the above matter.

Neither do I know what long distance telephone call you were obliged to make because of the depositions not being taken.

I have forgotten what the round trip bus fare is from Seattle to Bellingham and return, but I doubt that it is more than \$7.50.

I realize that under Rule 30(g)(1), as I told your brother last Saturday, our failure to attend and take these depositions, in view of your having done

so, obliges us to pay the amount of your reasonable expense and a reasonable attorney fee. I am not willing to pay for any long distance telephone calls until I know why they were necessarily incurred by you in connection with the trip, nor an attorney fee for two days when you could have easily made the trip in a half day, nor any in excess of the actual transportation cost except you possibly are entitled to one meal. I therefore enclose my check in your favor for \$60.00, of which \$50.00 is in payment of your attorney fee for one day, and \$10.00 expenses.

Please acknowledge receipt.

Yours very truly,

R. E. ROBERTSON,
Attorney-at-Law.

Enclosure

RER:er

c.c. W. L. Paul, Jr., Juneau
Clerk District Court, Juneau

[Title of District Court and Cause.]

MOTION FOR PRODUCTION OF DOCUMENTS
FOR INSPECTION, COPYING OR PHOTO-
GRAPHING

Objectors move that applicant produce at the hearing on applicant's Application and objectors' Objections in Juneau, Alaska, for the purpose of inspection and copying by objectors all of the official minutes and other books and records of applicant, its Board of Trustees, its Board of Equalization, and of its assessor or assessors, including oaths of office of such assessor or assessors, in any manner pertaining to the assessment, evaluating or levying of taxes upon the property of the objectors or any of them for the tax years 1950 and 1951.

Objectors hereby offer to pay the reasonable cost of transporting said records from Yakutat to Juneau, Alaska, and return by air express, parcel post, or airmail.

Dated at Juneau, Alaska, December 2, 1952.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed December 2, 1952.

[Title of District Court and Cause.]

DEPOSITION UPON INTERROGATORIES OF
HAROLD G. HEATON, A WITNESS
CALLED ON BEHALF OF OBJECTORS

Pursuant to Notice of Taking Deposition, hereto attached, on this 12th day of December, 1952, at the office of E. E. Lescher at 637 Central Building, Seattle, Washington, at the hour of 10:00 o'clock a.m., the deposition upon written examination of Harold G. Heaton, a witness called on behalf of the Objectors, upon direct interrogatories hereunto attached, to be used by the objectors in accordance with the Federal Rules of Civil Procedure at the hearing upon applicant's Application and objectors' Objections herein, was taken before E. E. Lescher, a Court Reporter and Notary Public in and for the State of Washington, residing at Seattle. [1*]

HAROLD G. HEATON

called as a witness on behalf of the Objectors, being first duly sworn by the Notary Public, in answer to written interrogatories testified as follows:

Inter. 1. Please state your name and residence.

A. Harold G. Heaton, 8720-19th N.W., Seattle 7, Washington.

Inter. 2. What is your official connection with the Objector, Libby, McNeill & Libby?

A. District Superintendent.

Inter. 3. State how long you have been employed

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Deposition of Harold G. Heaton.)

by Libby and in what various capacities and over and for what periods with approximate dates.

A. I have been employed by Libby, McNeill & Libby since 1943. Between 1943 and 1946 I was in charge of their New Products Division. During 1946 I was Superintendent of the Moser Bay Cannery. Since 1947, up to and including the present time, I have been District Superintendent.

Inter. 4. In what business did Libby engage in Alaska now and during those years?

A. Salmon canning.

Inter. 5. What, if any, experience, other than in the employment of Libby, have you had in the salmon canning business?

A. Starting in 1936 I was employed by the Columbia [2] River Packers Association as Technologist in charge of their Salmon Reduction Plant. In 1939 I was made Superintendent of their Elmore Cannery and continued in that capacity until terminating my services with them in 1943.

Inter. 6. In performing your duties as division superintendent of the salmon division of Libby, do you have anything to do with the construction, maintenance, or repair of the buildings that it uses in conducting the salmon canning business in Alaska? A. Yes.

Inter. 7. During what years have you had such duties? A. Since 1947.

Inter. 8. State briefly the scope of those duties.

A. All of Libby's divisions prepare what is known as Requests and Estimates for approval to

(Deposition of Harold G. Heaton.)

expend funds for both new construction and repairs to buildings; these Requests and Estimates are approved by the Board of Directors and the President and then we are permitted to expend those funds. I have charge of the processing and handling of all of those Requests and Estimates forms for the Salmon Division.

Inter. 9. In the performance of those duties did you familiarize yourself with the various buildings used by Libby in conducting its salmon canning operations in [3] Yakutat, Alaska, and other places in Southeastern Alaska? A. Yes.

Inter. 10. Did Libby operate a salmon cannery at Yakutat, Alaska, during the salmon fishing seasons of 1949 and 1950? A. No.

Inter. 11. If not, state why not.

A. Because, in our estimation, it would have been unprofitable in view of the reduced runs of fish which had appeared in the area during the few preceding years and the outlook for continuation of these reduced runs. The market outlook was also weak, and the condition of the property required somewhat larger than normal expenditures to maintain them in usable condition.

Inter. 12. State the last year during which Libby operated a salmon cannery at Yakutat, Alaska.

A. 1948.

Inter. 13. Upon whose land and in whose buildings did Libby conduct that salmon cannery at Yakutat?

(Deposition of Harold G. Heaton.)

A. Upon the land in the buildings of the Yakutat and Southern Railroad.

Inter. 14. In your employment by Libby what, if any, occasion have you had to ascertain the true and full value [4] of the various buildings it either owned or used in conducting its salmon canning operations in Alaska, including those at Yakutat?

A. A part of my responsibility annually is to check with the Superintendent of each cannery and determine what repairs and new investment items are going to be required for the following year. During the course of this checking I carefully go over each plant in Southeastern at least once a year, sometimes twice. A thorough examination of each of the buildings is conducted which includes testing the piling and capping underneath the buildings, checking the roofs for leaks during rainy periods, and examining the condition of dock piling and decking. In addition, the general condition of the buildings is noted with respect to paint, window sash, etc. As a result of these surveys, the superintendent and I determined that at Yakutat in 1950, to place the Yakutat plant in operation in 1951, major expenditures would be required for repairs to the dock, painting of buildings, foundation of superintendent's house, bookkeeper's house, sewer lines, ties and tracks, railroad cars, and water pumps. We determined that the condition of the building designated as Item 7, Exhibit A was so [5] deteriorated that it could no longer be used, and considerable expenditures would be required to in-

(Deposition of Harold G. Heaton.)

stall the canning machinery in the building designated as Item 6, Exhibit A, in order to permit a canning operation.

Inter. 15. As division superintendent of Libby what, if any, charge or supervision did you have of those buildings at Yakutat on June 1, 1950?

A. It was my responsibility to determine the extent of repairs, remodeling, and maintenance required.

Inter. 16. Were you familiar with those buildings at Yakutat and their condition on June 1, 1950? A. Yes.

Inter. 17. State the extent of your familiarity with them.

A. In 1948 I made a complete inspection of all the buildings as I do annually in all Libby Southeastern plants. In 1949 I made a special examination of the dock and its underpinning and a cursory examination of the other buildings in question. In 1950 a complete inspection was made of all buildings, and the conditions as outlined in the answer to Question 14 were noted. As a result of this survey, it was determined that major expenditures would be required to place the plant in operating condition for the next season. [6]

Inter. 18. Can you state what was the true and full value of those buildings on June 1, 1950?

A. Yes.

Inter. 19. Which, if any, of those buildings were used for or in connection with the canning of salmon during the years 1949 and 1950? A. None.

(Deposition of Harold G. Heaton.)

Inter. 20. What was each of those buildings used for during each of those years?

A. The store building, Item 4, Exhibit A, was used for the purpose of conducting a retail store. The stockroom, Item 5, Exhibit A, still had a small quantity of cannery supplies stored therein. The cannery building, Item 6, Exhibit A, was used during the winter months to store a truck and a few skiffs. Warehouse #1, Item 7, Exhibit A, was not used. Warehouse #2, Item 8, Exhibit A, housed the light plant which was used to supply power for the cold storage and light. The winterman's house, Item 10, Exhibit A, the Superintendent's House, Item 11, and the Guest House, Item 13, were used during the summer months to house Libby personnel. The round house, Item 18, Exhibit A, was used to house the truck and small cars operated on the railroad. The other buildings were not used. [7]

Inter. 21. State, in your opinion, how the true and full value of a building constructed for use in salmon canning operations would be affected by non-use for that purpose.

A. Such buildings would have a greatly reduced value.

Inter. 22. Attached is a list, marked Exhibit A, of 22 buildings or structures and one utility system including water, electric, and sewer distribution systems situated at Yakutat, Alaska. Please look at that list, and identify which of those buildings, structures, and systems, including their respective

(Deposition of Harold G. Heaton.)

then conditions, you were familiar with on June 1, 1950. A. All.

Inter. 23. Who owned said buildings, structures, and systems on June 1, 1950? Identify the ownership of each, if under any different ownership.

A. It is my recollection that the Yakutat and Southern Railway owned all of the structures listed thereon with a possible exception of Items 3, 20, and 23.

Inter. 24. Please take that list, item by item, and identify each building with which you were familiar on June 1, 1950, and describe its general structure, its then condition, its approximate age or date of construction, and its true and full value in your opinion, on June 1, 1950. [8]

A. Item 1. Dock structure. I made an examination of the under-part of this structure, both in 1948 and 1949, because we were in some doubt that it would stand. As of June 1, 1950, the piling were teredo-eaten, the capping and decking were rotten. No repairs had been made to the structures, except minor repairs to the decking, since 1944. True and full value on June 1, 1950—\$9,500.

Item 2. Dock warehouse. This is a single construction building which, in 1950, was in quite good repair. True and full value on June 1, 1950—\$3,800.

Item 3. Oil tanks. These were old retorts or second hand type tanks when installed and five were unserviceable in 1950, because they leaked around the rivets and the fittings where the pipes joined the tanks. True and full value on June 1, 1950—\$950.

(Deposition of Harold G. Heaton.)

Item 4. Store building. The foundation of this building was renewed in 1946 and 1947. The building was in good repair but needed painting. True and full value on June 1, 1950—\$9,500.

Item 5. Stockroom. The foundation of this building was renewed in 1947 and 1948, and the building was in good repair but needed painting. It is a double constructed building and housed the storekeeper's quarters on the top floor. True and full [9] value on June 1, 1950—\$9,500.

Item 6. Cannery building. The foundation and walls of this building were renewed in 1947 and 1948, and a concrete floor and foundation were installed. True and full value on June 1, 1950—\$31,300.

Item 7. Warehouse #1. This building was completely deteriorated, window casings, studs, and foundation were all rotted. We had planned to abandon this building when canning machinery was installed in the building designated as Item 6. True and full value on June 1, 1950—nil.

Item 8. Warehouse #2. In the fall of 1948, half of this building was torn down and the other half housed the power plant. The roof and foundation were in poor condition. True and full value on June 1, 1950—\$3,800.

Item 9. Old China house. Plumbing, heating and cooking facilities were removed and part of the building was torn down in 1948. Partitions and stairways were also changed in 1948 and the foundation had been recently repaired. The building was of double construction and fair condition. True and full value on June 1, 1950—\$9,000.

(Deposition of Harold G. Heaton.)

Item 10. Winterman's house. This structure was composed of three sheds added together [10] from time to time. The foundation was completely deteriorated. True and full value on June 1, 1950—\$475.

Item 11. Superintendent's house. This building also consisted of three sheds fastened together to make one building. The roof and foundation were completely deteriorated and the building was re-roofed in 1950, probably after June 1. True and full value on June 1, 1950—\$575.

Item 12. Bookkeeper's house. This building consisted of one small central room to which had been added three lean-tos at various times and was in poor condition both as to foundation and walls. True and full value on June 1, 1950—\$575.

Item 13. Guest house. This was a small building composed of one main room with two lean-to sheds attached, and was also in poor condition. The roof was deteriorated and the foundation was in poor condition. True and full value on June 1, 1950—\$575.

Item 14. Messhouse. This building was completed in either 1944 or 1945 and in June, 1950, was a good building in good condition. True and full value on June 1, 1950—\$4,750.

Item 15. Bunkhouse. This building was completed about the same time as the messhouse and cost approximately the same. It is of the same gen-

(Deposition of Harold G. Heaton.)

eral type [11] construction. True and full value on June 1, 1950—\$4,750.

Item 16. I am unable to identify.

Item 17. Bunkhouse #2. This was an old building which stood across the road from the other buildings on top of the hill. It was in very poor condition, and, while designed to house fifteen men, only the two front rooms had been used for the past several years that Libby operated the cannery. True and full value on June 1, 1950—\$475.

Item 18. Roundhouse. The foundation of this building is partly concrete and partly frame. The roof was in very poor condition. True and full value on June 1, 1950—\$1,425.

Item 19. Track warehouse. This building has had the shingles removed from one side of its roof since 1943 or 1944, and is filled with junk. The foundation is completely deteriorated and the walls are all rotted. True and full value on June 1, 1950—nil.

Item 20. Water tanks and tower. Two of the tanks were unusable and one of the towers was not in use in 1950, they were completely deteriorated. The others were in good condition and installed in 1946. True and full value on June 1, 1950— [12] \$2,850.

Item 21. Foreman's house. This is a frame building of comparable construction to those listed as Items 10, 11, and 12. True and full value on June 1, 1950—\$475.

Item 22. Red house. This is a smaller struc-

(Deposition of Harold G. Heaton.)

ture of the same type as Item 21. True and full value on June 1, 1950—\$240.

Item 23. Utility system, including water, sewer, and electric distribution systems. These were in a fair state of repair in 1950 and because of the large area covered in Yakutat would have a true and full value on June 1, 1950, of \$7,600.

Inter. 25. In your valuations did you use as a factor the non-use of any of the buildings and structures for salmon canning operations during 1949 and 1950? If so, explain and to what extent, and identify which buildings.

A. Valuations of all buildings enumerated under Question 24 take into consideration the factor of possible usage which at Yakutat was a limited usage owing to the deterioration of the salmon runs in the area. In the salmon canning business, as well as in any other business, any building has a value according to the use to which it may be put. The buildings at Yakutat were sufficient to put up much larger [13] packs than those which the fish runs would permit and I have valued the buildings accordingly.

Inter. 26. What, if any, other use did either Libby or the Yakutat & Southern Railway have for or make of said buildings during 1949 and/or 1950?

A. See answer to interrogatory 20.

Inter. 27. Do you admit or deny that the true and full value on June 1, 1950, of the land of the Yakutat & Southern Railway in the town Yakutat was \$8,000?

A. I admit that the true and full value on June

(Deposition of Harold G. Heaton.)

1, 1950, of the land of the Yakutat and Southern Railway in the town of Yakutat was \$11,000.

Inter: 28. Do you admit or deny that the true and full value on June 1, 1950, of the railroad trackage of the Yakutat & Southern Railway in the town of Yakutat was \$2,850?

A. I admit that the true and full value on June 1, 1950, of the railroad trackage of the Yakutat and Southern Railway in the town of Yakutat was \$2,700.

Inter. 29. Are those respective valuations identical with or different from the respective valuations stated in Objector Yakutat & Southern Railway's tax return for the year commencing June 1, 1950?

A. The respective valuations which I have stated in answers to questions 27 and 28 are identical [14] with the respective valuations stated in objector, Yakutat and Southern Railway's tax return for the year commencing June 1, 1950.

Inter. 30. Did Libby, McNeill & Libby on or about May 3, 1951, sell its stock interest in the Objector, Yakutat & Southern Railway to the Objector, Bellingham Canning Company? A. Yes.

Inter. 31. Did Libby enter willingly or unwillingly into that transaction? A. Willingly.

Inter. 32. Did Bellingham Canning Company enter willingly or unwillingly into that transaction?

A. Willingly.

Inter. 33. Upon what, if any, physical property was that transaction based?

(Deposition of Harold G. Heaton.)

A. All physical properties utilized in connection with the operation of Libby's Yakutat salmon cannery, including but not limited to, docks, buildings, land, railroad, and fishing sites, some of which were not in the confines of the City of Yakutat.

Inter. 34. What was the purchase price paid by Bellingham Canning Company to Libby for that transfer?

A. The purchase price paid by Bellingham Canning Company was \$120,000 for all fixed assets. This sum covered [15] not only the Real Property listed above but also machinery and equipment, trucks, tools and moveables, furniture and fixtures, floating equipment and ships. All trackage and railroad rights and property outside as well as inside the town and U. S. Survey #179 and other properties at Dry Bay outside the town.

/s/HAROLD G. HEATON,

Witness. [16]

Certificate

State of Washington,
County of King—ss.

I, E. E. Lescher, a Notary Public in and for the State of Washington, residing at Seattle, pursuant to Notice of Taking Deposition, hereto annexed, do hereby certify that on the 12th day of December, 1952, at the hour of 10:00 o'clock a.m., at my office

(Deposition of Harold G. Heaton.)

in the Central Building, Seattle, Washington, personally appeared Harold G. Heaton, a witness on behalf of the Objectors, for the purpose of giving his deposition upon written examination upon the direct interrogatories hereunto attached, in accordance with the Federal Rules of Civil Procedure at the hearing upon applicant's Application and objectors' Objections herein.

The above-named witness being by me first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to the written interrogatories submitted to him, deposed and said as in the foregoing deposition set out.

I Further Certify that the said Harold G. Heaton has read the said deposition given by him herein, and in my presence has subscribed his name thereto as being his true and correct testimony as given on said deposition, after said deposition was reduced to typewriting by me; and the original of the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the above-entitled court. [17]

I Further Certify that I have held this deposition proceeding open until today at Objectors' request but having been advised by them that applicant has filed or served neither objections nor cross-interrogatories I have today closed it.

I Further Certify that I am neither counsel nor attorney nor a relative or employee of counsel or

(Deposition of Harold G. Heaton.)

attorney of either the applicant or of any of the objections, and also I am not interested in this matter.

Witness My Hand and Official Seal at Seattle, King County, Washington, this 13th day of December, 1952.

[Seal] /s/ E. E. LESCHER,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed December 17, 1952. [18]

[Title of District Court and Cause.]

NOTICE OF FILING OF H. G. HEATON'S
DEPOSITION

To the City of Yakutat, Alaska, and its Attorney
William L. Paul, Jr.

You are hereby notified that the deposition of H. G. Heaton, on written interrogatories, taken on behalf of Objectors on December 12, 1952, in Seattle, Washington, before Court Reporter and Notary Public E. E. Lescher, has today been filed with the Clerk in the above proceedings.

Dated at Juneau, Alaska, December 17, 1952.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed December 17, 1952.

[Title of District Court and Cause.]

MOTION FOR ENTRY OF JUDGMENT BY
DEFAULT UNDER RULE 37(d)

Objectors move for entry of judgment by default against the applicant under Rule 37(d) upon the ground that applicant has failed to serve upon them its answers to their interrogatories submitted to it under Rule 33, which interrogatories were properly served upon applicant on November 21, 1952, nor has applicant filed its answers to said interrogatories or any of them.

This motion is based upon the records and dockets of the above-entitled proceedings.

Dated at Juneau, Alaska, December 12, 1952.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Notice

To the City of Yakutat, Alaska, and its attorney
Wm. L. Paul, Jr.:

You are hereby notified, in accordance with Rule 55(b)(2), that Objectors will present the foregoing motion to the above-entitled Court at 10 o'clock a.m., December 22, 1952, in the Federal-Territorial Court-house, in Juneau, Alaska, or as soon thereafter as the Court will hear the same, and then apply for

entry of judgment by default against you, The City of Yakutat, Alaska.

Dated at Juneau, Alaska, December 18, 1952.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed December 18, 1952.

[Title of District Court and Cause.]

Minutes of December 19, 1952

This case came on for hearing of objectors' Motion for Production of Documents. Wm. L. Paul, Jr., for City of Yakutat; R. E. Robertson for Objectors. After argument of counsel, the Court granted the motion. Objectors offered to pay the transportation expense of the records.

Subscribed and sworn to before me this December 22, 1952, at Juneau, Alaska.

[Seal] /s/ IRENE R. ERICKSON,
Deputy Clerk of the Court.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME

Applicant moves for an extension of time within which to answer objectors' interrogatories and request for admissions to the close of business December 22, 1952; and for grounds states that applicant's attorney has diligently attempted to secure the information desired from his clients at Yakutat and it was not until three days ago that the same was received, the delay being due to the distances involved and the extensive research requested by objectors in order to make adequate answer; and applicant's attorney has already typed the rough draft of answers and can have the final form for filing on December 22, 1952.

This motion was not made previously because since the return of the Court to this City, applicant's attorney has been so heavily involved in trial work before this Court as to make it impossible to apply earlier.

No delay injurious to the parties will occur by the granting of this motion.

December 19, 1952.

/s/ WILLIAM L. PAUL, JR.,
Applicant's Attorney.

[Endorsed]: Filed December 19, 1952.

[Title of District Court and Cause.]

APPLICANT'S ANSWERS TO OBJECTORS'
REQUEST FOR ADMISSION DATED NO-
VEMBER 21, 1952

United States of America,
Territory of Alaska—ss.

William L. Paul, Jr., being first duly sworn, on oath deposes and says that he is municipal attorney for applicant and makes these answers to Objectors' Request for Admission under Rule 36, dated November 21, 1952:

1. Yes.

2. Yes. Although the question and answer are immaterial since the Board of Equalization has a right to act as its own assessor.

3. Yes.

4. Yes, except as to Paragraph Arabic "A," we object to the materiality, relevancy, and competency of this item because a telegram does not constitute evidence usable by a Board of Equalization.

5. Yes, although we object to Item #5 Arabic A for the same reason as stated with respect to Paragraph 4, Arabic "A." As to item 5, "D," we object to the materiality, relevancy, and competency of this item on the ground that it seeks to elicit evidence of compromise.

6. Yes.

7. Yes.

8. Yes.

9. We object to this item on the ground that it

seeks to elicit evidence of compromise and hence is incompetent, irrelevant, and immaterial.

10. No, for the reason that in 1949-1950 Libby, McNeill & Libby planned to operate the cannery and the closure was not permanent.

11. This is denied because we do not have information sufficient to form a belief except that we deny that there was any substantial reduction in inventory of stock supplies although there might have been a slight reduction up to January 1, 1951.

12. Applicant denies the materiality of the removal of two Star boats, three Y boats, skiffs, and fishing gear. Also we object to the materiality of canning machinery and equipment on the ground that same was not owned by objector but by American Can Company. As to the remaining items, we do not have sufficient information on which to base a belief.

13. Applicant does not have sufficient information on which to base a belief, and hence denies.

14. This request is immaterial because Yakutat & Southern Railway was a corporation wholly owned by its parent Libby, McNeill & Libby.

15. This request is immaterial because Libby, McNeill & Libby was the parent of a wholly owned subsidiary Yakutat and Southern Railway.

16. We believe that Bellingham Canning Company purchased the land involved about May 5, 1951, and hence owned some of the property from that date to the end of the 1951 tax year or June 1.

17. Yes.

18. Yes.

19. Yes.

20. A small portion of the dock was removed, but the over-all value of the property was not changed.

21. Yes.

22. We admit the payments, but object to the materiality of the payments if this evidence is to be used as evidence of compromise, accord and satisfaction or estoppel on the ground that a city has no power to compromise a tax claim.

23. Same answer.

24. Same answer.

25. Same answer.

26. Same answer.

/s/ WILLIAM L. PAUL, JR.

[Endorsed]: Filed December 22, 1952.

[Title of District Court and Cause.]

APPLICANT'S ANSWERS TO OBJECTORS'
INTERROGATORIES OF NOVEMBER 21,
1952

United States of America,
Territory of Alaska—ss.

William L. Paul, Jr., being first duly sworn, on oath deposes and says that he is municipal attorney for applicant and makes these answers to objectors' interrogatories of November 21, 1952:

1. John G. Williams, Jr., was appointed assessor for the tax year 1950. His address is "Yakutat, Alaska."

2. No record is found of him taking an oath.

3. No record found.

4. The assessor was appointed by the Mayor by and with the advice and consent of the City Council.

5. We don't know insofar as our records are concerned.

6. Yes. We believe that he adopted the same valuations as for the previous year.

7. Same answer.

8. We believe that the same list for 1950 was used for 1951. We have carried over generally the valuations for 1949 into 1950 and 1951 unless some protest was presented with creditable evidence that a different figure should be used.

9. No record.

10. Insofar as an assessment list for 1950 and the book is concerned, the same figures have been used as were used in 1949 except insofar as has already been answered. This book was carried on through 1950 and is at Yakutat, Alaska, in the custody of the Clerk, Edward G. Johnson.

11. Yes.

12. The description of the property is the same as it always has been for tax purposes and you have this information already.

13. Yes. Along with Libby, McNeill & Libby.

14. Same answer as to Interrogatory #12.

15. Bellingham Canning Company was not named because the transfer occurred about three

weeks before the end of the tax year and we did not learn of the transfer until after the tax year for 1951 began, but if you want to make some adjustment on the basis of those three weeks we understand you have entered into an agreement between Libby and Bellingham on this three weeks' period which would make the payment equitable.

16. None.

17. No.

18. No answer required in view of previous answers.

19. No.

20. The only oath taken by anyone here by members of the City Council generally to perform their duties faithfully, honestly and impartially.

21. No answer required.

22. No answer required.

23. The property was inspected by the assessors shortly before the meetings of the Board of Equalization.

24. Yes. Shortly before the meetings of the Board of Equalization and the written record is the same for previous years.

25. Yakutat, Alaska, and assessed in the same manner as before, of which you already have a record as to the method of assessing and the amount.

26. Yes. Addresses: Yakutat, Alaska.

27. No affidavit.

28. Yakutat, Alaska.

29. Yes.

30. You already have a description of the property.

31. No.

32. None.

33. No.

34. None.

35. The City Council made the assessment for 1951.

36. At the times of the meetings of the Board of Equalization the assessment was made for 1951. We believe that substantially all the members of the City Council attended such meetings which were held probably in the school house, and probably a partial written record was kept of such meetings, depending upon the importance of the occasion. All such records are at Yakutat in the custody of the Clerk now.

37. Yes.

38. The Minute Book of the City of Yakutat has already been delivered to you and you have had as much opportunity as you wanted to examine the same, and we think you can see for yourself since this is the exclusive minute book of applicant.

39. Same answer for 2½ pages of questions.

40. Already answered.

41. Yes. The Trustees officially directed a City Clerk to post the notices of delinquent taxes. Such official posting is required by ordinance of which the objectors already have a copy, describing the time, manner and places of such posting and the requirement thereof.

42. No, except insofar as the next previous answer indicates a direction.

43. Already answered.

44. Already answered.

45. Already answered.

46. The same ordinance referred to last, directs the City Clerk to make such an application to the Court without reference to the Common Council, and it was on this basis that application was made.

47. Already answered.

48. Already answered.

49. That in addition to posting the Notice of Presentation of Delinquent Tax Roll to the District Court, at the Yakutat Post Office it was also posted at Mallott's Store on Bayview Street, near the center of town of the City of Yakutat, and on the front of the store of the Bellingham Canning Co., which is on the south side of the City of Yakutat. Such Bellingham Canning Company store being the other large store trading in general merchandise in the City of Yakutat, and the notices were posted on August 9, 1952, by John G. Williams, Jr., address, Yakutat, Alaska.

50. No designation was necessary since it is up to the City Clerk to follow the instructions of the ordinance, last above mentioned, to post in four of the most conspicuous public places in Yakutat, Alaska, and while the three places that he did choose are the most public conspicuous places in Yakutat, Alaska, he claims that there was no fourth place. By this he probably means that there was no fourth place. By this he probably means that there was no fourth place protected from the water where the notice could stay up for a substantial length of time.

In addition one of the notices posted on owner's property and constituted actual Notice of Presentation of Delinquent Tax Roll to Court in this proceedings.

51. Already answered.

52. Already answered.

53. Already answered.

54. Answer refused on the grounds that we are not concerned with personal property in this proceeding.

55. The valuation was made on the same basis as was made by Felix Toner in February, 1950. You already have the information as to Mr. Toner's method of assessment and manner. If you want the Court to take judicial notice of Mr. Toner's previous evidence in matters between us we hereby consent to join in such a request.

56. You have a description of your property already or the property which you recently owned, and that is the property we referred to in the valuation.

57. We went into this matter thoroughly in the previous cases against you in this Court, and the breakdown of figures would be the same as in the previous cases.

58. The amount claimed due of \$2,021.20 is the deficiency of tax in growth of 16 mills of realty and personalty of Bellingham Canning Company, the gross amount of tax is thus a simple matter of computation from which the amount of Bellingham Canning Company has actually paid, when deducted, leaves a balance due of \$2,021.20 principal amount

of tax. This means that Bellingham Canning Company has paid its personal property tax and total based upon a \$94,000 valuation and the balance of the tax claimed is attributed to the personalty.

59. The same method of computation as is set forth in paragraph #58.

The only thing further we can add is that a small portion of the dock was removed in 1951, we believe, and this was taken into consideration by the Board of Equalization meeting that year. We also received one letter of postponement of meeting after posting, but no good information could be got to be considered by the Board of Equalization.

/s/ WILLIAM L. PAUL, JR.

Subscribed and sworn to before me this December 22, 1952, at Juneau, Alaska.

[Seal] /s/ IRENE R. ERICKSON,
Deputy Clerk of the Court.

[Endorsed]: Filed December 22, 1952.

[Title of District Court and Cause.]

OBJECTORS' MOTION TO STRIKE

Objectors move to strike Applicant's motion for extension of time to answer Objectors' Interrogatories and Requests for Admissions because (1) said motion was served and filed without any notice of the time of presentation thereof as required by

Rules 33 and 36; (2) said motion was served and filed after Objectors had served and filed their motion for entry of judgment under Rule 37(d); and (3) said motion states no cause for relief under Rule 60(b).

Objectors, also, move to strike Applicant's Answers to Objectors' Request for Admissions because (1) said Answers were not sworn to under oath by an official of Applicant; (2) said Answers were filed on December 22, 1952, without the Court's permission and more than 10 days after service of said Request on November 21, 1952, and in utter disregard of Rule 36 as to time, manner, and form of response; and (3) Objectors further move to strike Answers 23, 24, 25 and 26 because they are unintelligible, and Answers 1, 12, 13, 14 and 15 because they are insufficient in that neither immateriality nor lack of knowledge constitutes an objection or response to a Request.

Objectors, also, move to strike Applicant's Answers to Objectors' Interrogatories because (1) said Answers were not sworn to under oath by an official of Applicant; (2) said Answers were filed on December 22, 1952, without the Court's permission and more than 15 days after service of said Interrogatories on November 21, 1952, and after Objectors had served their motion for entry of judgment by default under Rule 37(d) and while that motion was still pending and without any relief having been granted to Applicant under Rule 60(b) and in utter disregard of Rule 33 as to time, manner, and form

of answer; and (4) Objectors move to strike Answers 5 to 59, inclusive, because they are insufficient, contumacious, and do not answer the respective interrogatories separately and fully under oath.

Dated at Juneau, Alaska, December 23, 1952.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Notice

To Applicant and Its Attorney, William L. Paul,
Jr.:

Objectors will present the above motion to the above-entitled Court in Juneau, Alaska, at 10 a.m. December 29, 1952, and request the Court to then, or as soon as thereafter is convenient to the Court, hear it.

Dated at Juneau, Alaska, December 23, 1952.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed December 24, 1952.

[Title of District Court and Cause.]

MINUTES—MONDAY, DECEMBER 29, 1952

This case came before the Court for hearing on Objectors' Motion for entry of Judgment by Default; on Petitioner's Motion for an Extension of Time to Answer Interrogatories and on Objectors' Motion to Strike Motion for Extension and to strike Petitioner's Answers to Objectors' Request for Admission. Wm. L. Paul, Jr., for Petitioner; R. E. Robertson for Objectors. Counsel presented their arguments and the matter was taken under advisement.

Later this day the Court ruled as follows: Objectors' motions for default and to strike are denied. Treating Petitioner's Motion for Extension of Time as a Motion to allow filing of Answers to Interrogatories, motion is granted.

Thereupon Court was adjourned until tomorrow morning at 10 o'clock.

[Title of District Court and Cause.]

MOTION TO SUPPRESS APPLICANT'S
ANSWERS TO OBJECTORS' INTERROG-
ATORIES

Objectors move to suppress Applicant's hereinafter respective Answers to their Interrogatories and to require Applicant to further answer them

because each of them is insufficient for the reasons hereinafter respectively stated, viz.:

Answer 2. Evasive, and does not answer Interrogatory.

Answer 3. Evasive, and does not answer Interrogatory.

Answer 4. Evasive, and does not answer Interrogatory.

Answer 5. Evasive, and does not answer Interrogatory.

Answer 6. Evasive, and does not answer Interrogatory, except the first sentence therein.

Answer 7. Evasive, and does not answer Interrogatory, nor does it identify what it means by "same answer."

Answer 8. Evasive, and does not answer Interrogatory, and volunteers a legal conclusion.

Answer 9. Evasive, and does not answer Interrogatory.

Answer 12. Evasive, contumacious, and does not answer Interrogatory.

Answer 14. Evasive, contumacious, and does not answer Interrogatory.

Answer 15. All of it's volunteered except the words "Bellingham Canning Company was not named," and surplusage.

Answer 17. Unintelligible, contumacious, and does not answer Interrogatory in such manner as to state whether Board of Trustees elected to and made tax assessments, or whether that Board appointed an assessor to make the tax assessments.

Answer 18. Unintelligible, contumacious, and does not answer Interrogatory.

Answer 23. Fails to answer Interrogatory in full, or explain why can't answer remainder.

Answer 24. Fails to answer Interrogatory in full, or explain why can't answer remainder.

Answer 25. Unintelligible, contumacious, and does not answer Interrogatory in full, or explain why can't answer remainder.

Answer 26. Fails to answer Interrogatory in full, or explain why can't answer remainder.

Answer 30. Contumacious and does not answer Interrogatory.

Answer 36. Fails to answer Interrogatory in full, or explain why can't answer remainder.

Answer 38. Contumacious, surplusage, volunteered, and does not answer Interrogatory.

Answer 39. Unintelligible, contumacious, and does not answer Interrogatory.

Answer 40. Unintelligible, contumacious, and does not answer Interrogatory.

Answer 50. Unintelligible, contumacious, surplusage, volunteered, and does not answer Interrogatory.

Answer 51. Unintelligible, contumacious, and does not answer Interrogatory.

Answer 52. Unintelligible, contumacious, and does not answer Interrogatory.

Answer 53. Unintelligible, contumacious, and does not answer Interrogatory.

Answer 54. Contumacious, sham, frivolous, and does not answer Interrogatory.

Answer 55. Fails to answer Interrogatory, and is contumacious, volunteered, and surplusage.

Answer 56. Unintelligible, contumacious, volunteered, surplusage, and fails to answer Interrogatory.

Answer 57. Unintelligible, contumacious, volunteered, surplusage, and fails to answer Interrogatory.

Answer 58. Unintelligible, and fails to answer Interrogatory.

Answer 59. Unintelligible, fails to answer Interrogatory, and is volunteered and surplusage.

Dated at Juneau, Alaska, January 7, 1953.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed January 7, 1953.

[Title of District Court and Cause.]

MINUTES—FRIDAY, MARCH 27, 1953

This matter came before the Court for argument on Objectors' Motion to Suppress Applicant's Answers to Objectors' Interrogatories. Wm. L. Paul, Jr., for Applicants; R. E. Robertson for Objectors. The motion was sustained except as to Answer No. 4. Respondent was granted 2 weeks to respond with proper answers.

[Title of District Court and Cause.]

APPLICANT'S AMENDED ANSWERS TO
OBJECTORS' INTERROGATORIES OF
NOVEMBER 21, 1952

United States of America,
Territory of Alaska—ss.

Edward G. Johnson, being first duly sworn, on oath deposes and says that he is the clerk of applicant and makes these amended answers to Objectors' Interrogatories of November 21, 1952:

1. John G. Williams, Jr., was appointed assessor by applicant for the tax year 1950. His address is Yakutat, Alaska.

2. I don't know whether he took an oath in writing. Our records have been searched and we do not find any oath in writing. I have inquired of him and he says he was just appointed by the Council and Mayor, and no oath was taken.

3. No oath is to be found among the applicant's records and it is believed that no such oath was ever filed with applicant.

4. The assessor was appointed by the mayor by and with the advice and consent of the City Council. The meeting of the City Council at which such appointment was made was on 6th day of November, 1950, and a written record was made of the business transacted at such meeting, including the appointment of such assessor and the book in which such written record was entered is in the only record book the City of Yakutat has, namely, the book that

has all ordinances, minutes and resolutions entered in it. This book is at present in the custody of the present City Clerk, Edward Johnson; address, Yakutat, Alaska.

5. Yes, the assessor did inspect the property of Libby, McNeill & Libby and Yakutat and Southern Railway during the tax year 1950. His inspection was on or about the day of June, 1950.

6. Yes, the assessor did assess the property of Libby, McNeill & Libby during the tax year 1950. The date of assessment was on or about the day of June, 1950, and the written record appears in the Assessment Roll which is presently in the custody of the City Clerk. The property was assessed in a lump sum dividing personalty and realty. There is only one parcel. The amount of the assessment is as follows: Land, \$11,000.00; Improvements, \$176,625.00; Personal, \$94,000.00. Totals, \$281,625.00.

7. Same answer as for #6. The division between Yakutat & Southern Railway and Libby, McNeill and Libby was not made because it is impossible to distinguish the property of each. No division was made also because Yakutat and Southern Railway is a wholly owned subsidiary of the parent corporation Libby, McNeill & Libby.

8. We have an assessment roll. There was only one assessor for the tax year 1950.

9. I do not believe that any affidavit to the assessment roll of 1950 was made.

10. The assessment roll of 1950 is in the custody of the present City Clerk, Edward Johnson.

11. Yes, Libby, McNeill and Libby is named in the assessment roll for 1950.

12. The property of Libby, McNeill and Libby described in the assessment roll for 1950 is as follows: Land, \$11,000.00; Improvements, \$176,625.00; Personal, \$94,000.00.

13. The property of Yakutat and Southern Railway is combined with that of Libby, McNeill & Libby on the assessment roll for the reasons above stated.

14. Already answered.

15. Bellingham Canning Company was not named because the transfer from Libby, McNeill & Libby and Yakutat and Southern Railway occurred about three weeks before the end of the tax year and we did not learn of the transaction until after the tax year for 1951 began. If objectors want to make some adjustment on the basis of these three weeks on the basis of objectors' agreement with Bellingham Canning Company for this period, the same is perfectly agreeable to the applicant.

16. No property is described on the assessment roll as being owned by Bellingham Canning Company for the tax year 1950 for the reason above stated.

17. No, the Board of Trustees did not make the assessment for the tax year 1950, but appointed an assessor to do so.

18. No answer required.

19. No assessor was appointed for the tax year 1951.

20. No answer required.

21. No answer required.

22. No answer required.

23. Yes, the assessor did inspect Bellingham Canning Company and Yakutat and Southern Railway for the tax year 1951. Inspection was shortly before the meeting of the Board of Equalization for both.

24. The property was inspected by the Board of Equalization acting as assessors shortly before the Board of Equalization meetings began. The date of the meeting of the Board of Trustees which later resolved itself into a Board of Equalization at which the assessments was made, was 12th day of November, 1951. The meeting was held at A. N. B. Hall office, Yakutat, Alaska. A written record was made of the business transacted at such meeting, although there does not formally appear that the Board made an appointment of itself as assessor. The book in which these facts appear is stated above and its present location is that it is in the custody of Edward Johnson, City Clerk, at Yakutat, Alaska.

25. Assessment of Yakutat & Southern Railway for the tax year 1951 was not made because by that time Bellingham Canning Company owned substantially all of the property.

26. Yes, the assessor did make a list, being in the same book which we call the Assessment Roll. The Assessment Roll provides for several years going into one book and generally these are carried on from year to year at just about the same figures unless some change is made. Insofar as the new figures being entered in the same book I think that

was done by the City Clerk for the tax year 1951. I don't know the date when these entries were made, but I think it was shortly before the Board of Equalization meeting above mentioned.

27. No affidavit was made to the assessment roll for the values of the tax year 1951.

28. The assessment roll for the tax year 1951, which is the only list or book we have, is in the custody of the City Clerk, Edward Johnson; address, Yakutat, Alaska.

29. Yes, the Bellingham Canning Company was named in the assessment roll for 1951.

30. The property assessed to Bellingham Canning Company for the tax year 1951 on the assessment roll appears in substantially the same categories as for Libby, McNeill & Libby, and Yakutat and Southern Railway and is described as follows: Land, \$11,000.00; Improvements, \$176,625.00; Personal, \$94,000.00. Totals, \$281,625.00.

31. No, Yakutat & Southern Railway was not named in the Assessment Roll for 1951.

32. No answer required.

33. No answer required.

34. Already answered.

35. The City Council made the assessment for the tax year 1951, it being its selection so to do.

36. The assessment was made by the City Council at its meeting of the 12th day of November, 1951. The roll call shows the following members of the City Council present: Sheldon, James, Jr.; Ben Peterson, James Whiting, Bernard Henniger. The meeting was held at the School House. A partial

written record of such meeting was kept. The nature of such written record is of the proceedings occurring at such meeting. The present custodian of such records is the City Clerk, Edward Johnson; address, Yakutat, Alaska.

37. Yes, the objectors set out in their Interrogatory #37 what appears in the minute book an official record of the City of Yakutat, a true statement.

38. I have answered Interrogatory #37 in the affirmative and state that there is no other record of entry or statement relative to an assessor than what appear from the so-called minute book of the City of Yakutat.

39. The official minute and record book of applicant which includes minutes of the Board of Equalization from October 2, 1948, through October 6, 1952, do not show any statements or entries relative to assessments of Libby, Yakutat & Southern Railway, and Bellingham Canning Company other than those stated in Interrogatory #39.

40. I have answered #39 in the affirmative. This is no other record book of the proceedings of the Board of Trustees and the Board of Equalization of the City of Yakutat.

41. Yes, the Trustees officially directed the City Clerk to post the notices of delinquent taxes in the manner prescribed by the tax ordinance of the City of Yakutat.

42. No special order was given to the City Clerk to post the notices except that the tax ordinance requires the Clerk to do so.

43. No special order is necessary to the City Clerk to post the notices since such order appears in the tax ordinance.

44. Already answered.

45. Yes, there was a written record kept of the meeting which adopted the tax ordinance and the amendments to tax ordinance directing the City Clerk to perform duties of posting notices of delinquent taxes. This record is kept in the same minute book above mentioned. It is in the custody of the City Clerk, Edward Johnson; address, Yakutat, Alaska.

46. Yes, the order was given to have the application filed in the District Court at Juneau. The order appears in the tax ordinance and no special further order is necessary or was made.

47. The direction to file the application was made by means of the meeting which adopted the tax ordinance and the amendments to the tax ordinance. The tax ordinances and amendments were adopted on the following dates: Original ordinance on July 3, 1948, and Amendment May 5, 1952, and the names and addresses of the trustees attending those meetings are as follows: Ben Peterson, James Whiting, Herbert Bremner, Sheldon James, Jr.

48. Yes, a written record was kept of business transacted at the meetings at which the tax ordinances and amendments were adopted. This record appears in the minute book above described which is in the custody of the present City Clerk, Edward T. Johnson; address, Yakutat, Alaska.

49. The three conspicuous places other than

Yakutat Post Office at which applicant's notice of delinquent taxes on real property was posted, and the date of posting, and the name and address of the person making such posting are as follows: Bellingham Canning Co., Mallott's General Store; dates of posting not remembered; posting done by John G. Williams, Jr.

50. No special designation was made as to the three places.

51. The designation appears in the tax ordinances that they are to be the four most conspicuous public places in the City of Yakutat, and no more particular places appear than that.

52. This question is already answered in the sense that a designation was made in the tax ordinances.

53. This question is already answered in the sense that the designation was made by means of the tax ordinances.

54. The property covered by the word "personal \$94,000" in the applicant's notice of delinquent taxes includes inventory, supplies, fixtures, machinery that has become part of the realty by being fastened down, plumbing, electric wiring, but does not include machinery fastened down leased from American Can Company.

55. Each individual building was not assessed separately, although during the computation arriving at the figure of frame buildings \$176,625 each building was segregated.

56. The item "frame buildings \$176,625" are those buildings appearing on the land now owned

by Bellingham Canning Company. The same segregation was made as appears in the evidence in that certain cause entitled "In re Yakutat Delinquent Tax Roll for 1948-1949."

57. Already answered.

58. We arrive at the figure \$2,021.20 as follows: The gross assessed valuation multiplied by the millage rate less the amount paid by Bellingham Canning Company, plus 12% penalty on the balance, plus 12% annual interest to date on the balance of tax plus penalty.

59. The method of computation for the figure \$1,639.65 is the same as stated in answer #58.

/s/ REV. EDWARD G. JOHNSON.

Subscribed and sworn to before me at Yakutat, Alaska, this 8th day of May, 1953.

/s/ JOHN G. WILLIAMS, JR.,
Postmaster.

Receipt of copy acknowledged.

[Endorsed]: Filed May 11, 1953.

[Title of District Court and Cause.]

MOTION FOR TRIAL

It appearing from the files and records of this Court and cause that this matter is at issue, applicant moves that the same be set down for trial and suggests May 7, 1954, at 10 a.m.

February 27, 1954.

/s/ WILLIAM L. PAUL, JR.,
Applicant's Attorney.

cc. R. E. Robertson,
Attorney for Objectors.

[Endorsed]: Filed March 4, 1954.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS

Objectors move for a summary judgment under Rule 56 FRCP and for judgment on the pleadings under Rule 12 *ibid*.

These motions are based upon the records, files, and dockets of this case, and upon the letter of September 8, 1953, of the counsel of the City of Yakutat to Objectors' attorney, a copy of which letter was sent by said City of Yakutat's attorney to the Clerk of the above-entitled Court according to the notation on the original thereof.

Dated at Juneau, Alaska, April 17, 1954.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

To the City of Yakutat, Alaska, and its attorney,
William L. Paul, Jr.:

You are hereby notified that Objectors will present their motion for judgment on the pleadings on the first regular call of the motion calendar, and its motion for a summary judgment 10 days after service hereof, or as soon thereafter as the Court may be pleased to hear it.

Dated at Juneau, Alaska, April 17, 1954.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1954.

[Title of District Court and Cause.]

MINUTES—FRIDAY, APRIL 23, 1954

Upon the calling up of this case for hearing on a Motion to set for Trial, and a Motion for Judgment on Pleadings, Mr. Paul moved for this case to be set over and a day set for hearing. Mr. Robertson concurred. It was set for hearing on Wednesday, April 28th.

[Title of District Court and Cause.]

AFFIDAVIT ON MOTION FOR SUMMARY
JUDGMENT AND JUDGMENT ON PLEAD-
INGS

United States of America,
Territory of Alaska—ss.

William L. Paul, Jr., being first duly sworn, on oath, deposes and says that he is municipal attorney for applicant, City of Yakutat, in this matter; and that he makes this affidavit on behalf of plaintiff in opposition to the objectors' motion for summary judgment and judgment on the pleadings.

Objectors have paid applicant a sum more than sufficient to satisfy their personal property taxes, and such sum has been applied by applicant to pay said personal property taxes, penalty and interest, and there is nothing due thereon; and this matter concerns on real property taxes, interest and penalty.

/s/ WILLIAM L. PAUL, JR.

Subscribed and sworn to before me this April 26,
1954.

[Seal] /s/ P. D. E. McIVER,
Deputy Clerk of the Court.

Receipt of copy acknowledged.

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF APRIL 28, 1954

This case came before the court for hearing on a Motion to Set for Trial and for Motion for Summary Judgment. Wm. L. Paul, Jr., for Applicants; R. E. Robertson for Protestants. Counsel presented their arguments following which the court took the matter under advisement. In Cause No. 6581-A the court set Mr. Robertson's Motion for Judgment on the Mandate for hearing on the next Motion Day.

Thereupon court was adjourned till tomorrow morning at 10 o'clock.

[Title of District Court and Cause.]

MINUTE ENTRY OF APRIL 30, 1954

The court having heard counsels' arguments on the Motions herein, at this time ruled that said motions for Judgment would be denied.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, MAY 10, 1954

This matter came on for trial before the Court. Wm. L. Paul, Jr., appeared for Petitioner, City of Yakutat; R. E. Robertson appeared for Objectors, Libby, McNeill & Libby, Yakutat & Southern Ry. and Bellingham Canning Co. Petitioner proceeded by calling Dorothy Henry, City Clerk of Yakutat,

who was sworn. The Duplicate Delinquent Tax Roll for the City of Yakutat for the years 1950 and 1951 was offered in evidence and to which Mr. Robertson objected. After argument it was admitted in evidence as Ex. 1, subject to the objection. Page 5 of an Assessment Book was admitted as Ex. 2, with leave to substitute a photostatic copy in lieu of the original page. Petitioners stipulated that Protestants' objections Nos. 1, 3, 4 and 9, were admitted. Edward G. Johnson's Amended answers to interrogatories, dated Nov. 21, 1952, were admitted in evidence. Counsel stipulated that Objectors' witnesses would testify that the value of the properties of the objectors hereto would be the same as reflected by paragraph 10 of the objections. It was stipulated that as of June 1, 1950, Bellingham Canning Co. did not own any property subject to tax, in Yukutat, and that its interest was acquired May 5, 1951. It was also stipulated that at the time of purchase, the Bellingham Canning Co. paid \$120,000 to Libby, McNeill & Libby for all the physical assets in the City of Yakutat. Upon the completion of the examination of the witness, Dorothy Henry, Petitioner rested. Mr. Robertson moved, in behalf of the Objectors, for dismissal of petitioner's case. Ruling was reserved.

Court was thereupon recessed till 2 p.m.

Monday, May 10, 1954 (2), 2:00 P.M.

With all parties present as at the morning session the trial in this case was resumed. Objectors introduced in evidence Edward G. Johnson's Amended Answers of May 8, 1953, to the interrogatories dated Nov. 21, 1952, numbers 1, 2, 3 and 31, also Mr. Paul's answers to Nos. 31 and 33, to same interrogatories. Also admitted Mr. Paul's answers to Request for Admission Nos. 1, 2 and 3. It was also stipulated that Ordinance No. 1 of the City of Yakutat was in force in 1950 and 1951 and amended in 1952 and thereupon the Objectors rested.

In rebuttal, petitioner called J. B. Mallott, who was sworn and testified as to an amendment to Ord. No. 1, and upon which both sides rested. Matter submitted with briefs to be filed. Each side to have 10 days and with a further 5 days for reply brief if found necessary.

[Title of District Court and Cause.]

MINUTE ENTRY OF JUNE 16, 1954

At this time the Court signed a Memorandum Decision in this case.

In the U. S. District Court for the District of
Alaska, Division Number One, at Juneau

No. 6734-A

In the Matter of:

THE DELINQUENT AND SUPPLEMENTAL
DELINQUENT TAX ROLL OF REAL AND
PERSONAL PROPERTY FOR THE CITY
OF YAKUTAT, ALASKA, FOR THE
YEARS 1950 AND 1951,

LIBBY, McNEILL & LIBBY, a Corporation, and
YAKUTAT & SOUTHERN RAILWAY, a
Corporation,

Objectors.

MEMORANDUM DECISION

I find that the objections are either lacking in merit or of such a nature as not to affect the substantial rights of the objectors and, hence, conclude that the application for an order of sale of the real property should be granted.

Done at Anchorage, Alaska, this 16th day of June, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed June 18, 1954.

[Title of District Court and Cause.]

BILL OF COSTS

| | |
|--|----------|
| Fees for witnesses (itemized on reverse side) | \$ 54.00 |
| Attorney fee allowed by Court..... | 785.14 |
| for same to be allowed by City Clerk on order of sale auction..... | 100.00 |
| | <hr/> |
| Total | \$939.14 |

United States of America,
Territory of Alaska—ss.

I, William L. Paul, Jr., do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to R. E. Robertson, Attorney for objectors, with postage fully prepaid thereon.

/s/ WILLIAM L. PAUL, JR.,
Applicant, City of Yakutat.

Subscribed and sworn to before me this day
of June, A.D. 1954, at Juneau, Alaska.

[Seal] /s/ JOHN H. DIMOND,
Notary Public for Alaska.

My Commission expires 10/5/56.

Costs are hereby taxed in the amount of \$.
this day of June, 1954, and that amount in-
cluded in the judgment.

J. W. LEIVERS,
Clerk.

(Back)

Applicant, Dorothy Henry, City Clerk

Attendance-Subsistence, 1 day \$ 4.00

Travel 1 day each way from Yakutat, 2 days 8.00

J. B. Mallott

Attendance-Subsistence, 1 day 4.00

Travel, 2 days 8.00

At 200 miles at 15c 30.00

Total \$54.00

Receipt of copy acknowledged.

[Endorsed]: Filed June 18, 1954.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT, CON-
CLUSIONS OF LAW, ORDER OF SALE,
AND COST BILL

Objectors, without prejudice to its objections and
motions heretofore filed herein, all of which it
hereby renews, object to and protest against the
entry of Applicant's proposed Findings of Fact,

Conclusions of Law, Order of Sale, and Cost Bill, i.e.:

1. This Court is bound by the rule of law laid down by the United States Court of Appeals for the Ninth Circuit on the appeal to it from the Order of Sale entered by this Court on April 25, 1952, which is reported in 206 F. 2d 612, and whose opinion and mandate are *res judicata* herein, and this Court has no authority or jurisdiction to enter or allow said findings, conclusions, order, or cost bill.

2. Said Findings, Conclusions, Order, and Cost Bill are contrary to the law and to the evidence, and entirely ignore the fact that the preponderance of the evidence showed that the assessments for each year were over valued and over assessed, and disregard the fact that the evidence proved that the actual value of the various properties during the two years were as claimed by objectors, and disregard the fact that for neither said years were any of said taxes fairly assessed or equalized.

3. Said Findings, Conclusions, Order, and Cost Bill are based upon a duplicate delinquent tax roll which did not show and separately state and show the amount of taxes, penalty and interest due upon realty alone and lumped and stated in a single amount the taxes upon realty and personalty, and are based upon incompetent, aliunde evidence of Dorothy Henry that impeaches it.

4. Said Findings, Conclusions, Order, and Cost Bill impose upon Objector, Yakutat & Southern Railway's real property a lien for interest of 1%.

per month from February 1, 1951, to May 31, 1954, amounting to \$894.61, upon taxes and penalty for 1950, and a lien for interest of 1% per month from December 7, 1951, to May 31, 1954, amounting to \$538.44, upon taxes and penalty for 1951, whereas Applicant's tax Ordinances in effect during the tax years 1950 and 1951 did not provide or fix any rate of interest to be paid upon either delinquent taxes or penalties thereon.

5. Said Findings, Conclusions, Order and Cost Bill impose upon Objector Yakutat & Southern Railway's real property a lien for a tax of 1% per month from February 1, 1951, to May 31, 1954, upon a purported penalty of \$201.32 for 1950 and from December 7, 1951, to May 31, 1954, upon a purported penalty of \$163.16 for 1951, whereas neither Sections 16-1-121 through 130, ACLA 1949, nor any other statute authorizes the municipality to fix any interest upon any penalty for nonpayment of municipal taxes.

6. Under said Findings, Conclusions, Order and Cost Bill Applicant has applied \$2,848.80, paid by Objectors Libby, McNeill & Libby and Yakutat & Southern Railway for 1950, and \$2,866.36, paid by Objectors Bellingham Canning Company and Yakutat & Southern Railway for 1951, contrary to the respective Objectors' instructions as to the payment of those sums and the application thereof, and which sums the Applicant retained and has not returned to Objectors.

7. Said Findings, Conclusions, Order and Cost Bill impose a lien upon Objector Yakutat & Southern Railway's real property for attorney's fees of \$785.14 and for a further \$100.00 to be allowed to or by the City Clerk on order of sale auction, whereas neither Sections 16-1-121 through 130, ACLA 1949, nor any other statute authorizes an attorney's fee to be taxed as costs in these proceedings, or to make it a lien upon said Objector's real property, and that the allowance of any of said attorney's fees is contrary to the provisions of the United States Constitution, and particularly to the Fifth and Fourteenth Amendments, and constitutes a deprivation of said Objector's real property without due process of law or just compensation.

8. Said Findings, Conclusions, Order and Cost Bill impose a lien upon Objector Yakutat & Southern Railway's real property for witness fees and mileage of J. B. Mallott of \$54.00, whereas said Mallott was a spurious, unnecessary and voluntary witness and testified to no material or other fact other than in substance he said he thought he remembered another ordinance but he didn't know when it was enacted.

Dated at Juneau, Alaska, June 24, 1954.

/s/ R. E. ROBERTSON,
Of Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed June 24, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF JUNE 24, 1954

At this time this matter came on for hearing. Wm. L. Paul, Jr., was present for Plaintiff; R. E. Robertson for Objectors. Mr. Robertson filed Objections to Findings of Fact, Conclusions of Law, Order of Sale, and Cost Bill. After discussion, Mr. Paul asked the Court for time until 2:00 p.m. to submit authorities on Objections, which the court granted.

[Title of District Court and Cause.]

MINUTE ENTRY OF JUNE 25, 1954

This matter having been heard yesterday on Objections to Findings of Fact, Conclusions of Law, Order of Sale and Cost Bill filed by R. E. Robertson, Attorney for Objectors, the Court at this time ruled that the objections of the taxpayers to the allowance of interest on penalties and of a fee to the City Clerk, are sustained and all other objections are overruled.

[Title of District Court and Cause.]

OBJECTIONS TO ORDER OF SALE

Objectors hereby Object to the Order of Sale, which was served upon them on June 26, 1954, upon all the grounds, including but not limited to the items of monthly 1% interest on the alleged de-

linquent taxes for both of said years and to the item of "attorney's fee to applicant of \$923.40," made by them on June 24, 1954, to the proposed Order of Sale that was served upon them on June 18, 1954, and by reference thereto incorporate herein their "Objections to Findings of Fact, Conclusions of Law, Order of Sale and Cost Bill," dated June 24, 1954.

Dated at Juneau, Alaska, June 28, 1954.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed June 28, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF JUNE 29, 1954

As entered in Journal No. 21, Page 475. This pertains to both No. 6581-A and No. 6734-A.

At this time these matters came before the court for hearing on Objections to Order of Sale in the above-entitled cases. William L. Paul, Jr., was present in behalf of Plaintiffs; R. E. Robertson for Objectors. After argument the Court directed that in Cause No. 6581-A evidence heretofore introduced in support of objections to the Tax Roll be considered in support of the objections to the present tax roll. Thereafter the Court signed Order of Sale in each case.

MINUTE ENTRY OF JULY 27, 1954

As entered in Journal No. 21, Page 493.

Hearing on Motion for a New Trial in the above case set for 2:00 p.m. Wednesday, July 28th.

MINUTE ENTRY OF JULY 28, 1954

As entered in Journal No. 21, Page 496. This pertains to both Nos. 6581-A and 6734-A.

Objectors' Motion, on June 30, 1954, to amend or alter the Minute Order entered in Cause No. 6581-A on June 29, 1954, was allowed upon applicant's consent but subject to applicant's non-admission of any objectors' legal conclusions stated in this Objections in support of their Motion, dated June 23, 1954, to Strike Applicant's Amended Duplicate Delinquent Tax Roll for 1949, dated June 23, 1954, and without admitting the legal validity of those Objections.

Objectors' Motions for New Trial in both causes Nos. 6581-A and 6734-A, after argument of counsel, were denied.

Applicant's Application to withdraw its original municipal records on deposit with the Clerk of the Court was allowed upon applicant's agreement that it would promptly return into the custody of the Clerk such of those records as the objectors might request.

MINUTE ENTRY OF JULY 30, 1954

As entered in Journal No. 21, Page 500. This pertains to both Cases No. 6581-A and No. 6734-A.

At this time Mr. R. E. Robertson, Attorney for Objector Appellants, Libby, McNeill & Libby and Yakutat & Southern Railway, filed Notice of appeal to the U. S. Court of Appeals for the 9th Circuit under Rule 73(b) and Supersedeas on Appeal, which the Court approved, Mr. Wm. L. Paul, Jr., Attorney for Applicant-Appellee for City of Yakutat, was present and stated he had no objection to filing.

Approved and appeal allowed and order of sale stayed this 30th day of July, 1954, in Juneau, Alaska.

MINUTE ENTRY OF OCTOBER 6, 1954

As entered in Journal No. 22, Pages 38-39.

Upon consideration of the Objectors Motion for Extending Time to docket Appeal, the Court granted the motion and signed an Order thereon.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau

No. 6734-A

In the Matter of:

THE DELINQUENT TAX ROLL OF REAL
AND PERSONAL PROPERTY OF THE
CITY OF YAKUTAT, ALASKA, FOR THE
YEARS 1950 AND 1951,

YAKUTAT & SOUTHERN RAILWAY, LIBBY,
McNEILL & LIBBY and BELLINGHAM
CANNING COMPANY, Each a Corporation,

Objectors.

ORDER OF SALE

This matter having come on regularly to be heard on the application of the City of Yakutat and the Objectors' objections; and the Court having considered the evidence and testimony adduced by the parties and the arguments of counsel, and being fully advised in the premises, it is by the Court:

Ordered, Decreed and Adjudged that Objectors are delinquent for a balance due on real property taxes as follows: For the tax year 1950, \$2,033.20, plus a penalty of 12%, being \$243.98, and interest at 1% monthly since the delinquent date of December 15, 1950, on balance of delinquent tax, being interest of \$874.28; and for 1951 tax year \$1,631.35, plus penalty of \$195.76 and interest since December 15, 1951, at 1% monthly on delinquent balance of

tax, being the sum of \$489.41 to date hereof; assessed against real property of objectors, being that embraced by United States Survey No. 1758 (Alaska), also known as Survey No. 2881 (Alaska); that said property be sold for the payment of the aforesaid sums, including costs of this hearing, including an attorney's fee to applicant of \$923.40 as for contested lien cases, according to local rule No. 45, said costs to be taxed by the Clerk of this Court; said sale to be at a time certain as fixed by applicant within 60 days in the manner provided by law.

Done at Juneau, Alaska, this June 29, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

Copy Received June 26, 1954.

I object to entry of order until I have opportunity to present objections.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

[Endorsed]: Filed June 29, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS ON APPEAL

Whereas, Yakutat & Southern Railway, a corporation; Libby, McNeill & Libby, a corporation, and Bellingham Canning Company, a corporation, the objectors in the above proceedings, have appealed

to the United States Court of Appeals for the Ninth Circuit from that certain order of sale made and entered in the above proceedings on June 29, 1954, wherein and whereby in the above proceedings the District Court for the Territory of Alaska, First Judicial Division, ordered the sale of the objectors' real property to be sold by said applicant at public sale to satisfy and discharge the lien of the taxes that are the subject of said proceedings, together with penalty and interest and costs upon said taxes and costs and disbursements of this proceeding, including an attorney fee, and from that certain order, made and entered in said proceedings on July 28, 1954, denying objectors' motion for a new trial; and,

Whereas, said objectors are desirous of staying the sale so ordered by said order of sale and so appealed from, and the Court has set, with applicant's consent, the penal amount of the supersedeas and cost bond in the sum of \$6,000.00.

Now, Therefore, in consideration of the premises and such appeal, we, Yakutat & Southern Railway, a corporation, objector; Libby, McNeill & Libby, a corporation, objector, and Bellingham Canning Company, a corporation, objector, as Principals, and the United States Fidelity and Guaranty Company, a corporation, organized and existing under the laws of the State of Maryland and engaged in and authorized to engage in business in the Territory of Alaska, as Surety, do hereby jointly and severally undertake and promise, and acknowledge

ourselves bound in the sum of \$6,000.00 that the objector corporation, Yakutat & Southern Railway; objector corporation Libby, McNeill & Libby, and objector corporation Bellingham Canning Company will satisfy in full said taxes, together with penalty and interest and costs upon said taxes, and costs and disbursements of this proceedings, as well as damages for delay, if for any reason the appeal is dismissed or if said order of sale is affirmed, and similarly to any and all extent should said order of sale be modified, and such costs, interest, and damages, as the appellate court may adjudge and award.

In Witness Whereof Yakutat & Southern Railway, a corporation, objector; Libby, McNeill & Libby, a corporation, objector, and Bellingham Canning Company, a corporation, objector, as Principals, and United States Fidelity and Guaranty Company, a corporation, as Surety, have caused these presents to be executed this 30th day of July, 1954, in Juneau, Alaska.

YAKUTAT & SOUTHERN
RAILWAY, a Corporation,
Objector;

By /s/ R. E. ROBERTSON,
Its Attorney and Agent.

Executed in the presence of:

/s/ F. O. EASTAUGH,

/s/ EILEEN ROBERSON,

LIBBY, McNEILL & LIBBY, a
Corporation, Objector;

By /s/ R. E. ROBERTSON,
Its Attorney and Agent.

Executed in the presence of:

/s/ F. O. EASTAUGH,

/s/ EILEEN ROBERSON,

BELLINGHAM CANNING
COMPANY, a Corporation,
Objector;

By /s/ R. E. ROBERTSON,
Its Attorney and Agent,
Principals.

Executed in the presence of:

/s/ F. O. EASTAUGH,

/s/ EILEEN ROBERSON.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

By /s/ R. E. ROBERTSON,
Its Attorney-in-Fact and
Agent, Surety.

Executed in the presence of:

/s/ F. O. EASTAUGH,

/s/ EILEEN ROBERSON.

Attest: Corporate Seal.

United States of America,
Territory of Alaska—ss.

Acknowledged before me this 30th day of July, 1954, in Juneau, Alaska, by R. E. Robertson, as attorney and agent of the objector corporations, Yakutat & Southern Railway, Libby, McNeill & Libby and Bellingham Canning Company, Principals, as their free and voluntary act and deed, and as attorney-in-fact and agent on behalf of the United States Fidelity and Guaranty Company, a corporation, Surety, as the latter's free and voluntary act and deed.

Witness my hand and official seal the day and year herein first written.

/s/ FREDERICK O. EASTAUGH,
Notary Public for Alaska.

My commission expires June 10, 1958.

Approved and appeal allowed and order of sale stayed this 30th day of July, 1954, in Juneau, Alaska.

[Seal] /s/ GEORGE W. FOLTA,
Judge of the District Court for the Territory of
Alaska, Division No. 1.

[Endorsed]: Filed in open court July 30, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendants move for a new trial because of abuse of discretion exercised and errors committed by the Court in the conduct of these proceedings all of which appear in the dockets, files, and record of this cause, and all of which are incorporated herein by reference to said dockets, files and record, and in ignoring the provisions of Sections 16-1-121 through 130, ACLA 1949, whereby these proceedings are governed, and in not construing those statutes in favor of Objectors and against the Applicant but to the contrary in all instances either ignoring those statutes or construing them in favor of the Applicant and against the Objectors, and in denying and overruling Objectors' Motions of April 17, 1954, for Summary Judgment and for Judgment on the Pleadings, and Objectors' Objections of September 8, 1952; Objections, dated June 24, 1954, to Findings of Fact, Conclusions of Law, Order of Sale and Cost Bill, and Objections, dated June 28, 1954, to Order of Sale, and in not abiding by the principal of law announced by the Honorable United States Court of Appeals for the Ninth Circuit in *Libby, McNeill & Libby, et al., v. The City of Yakutat, Alaska*, 206 F. 2d 612, whose opinion and mandate in cause No. 6581-A are res judicata herein, and in making and entering its Order of Sale herein on June 29, 1954, notwithstanding the evidence that the Objector, Yakutat & Southern Railway, was at all times the owner of the real property involved

herein but that the said taxes, for which its real property has been ordered sold, was not assessed against it, and creating a tax lien upon its real property and thereby depriving it of its said property and in further creating a lien upon its real property for interest at 1% monthly, as stated in said Order of Sale, notwithstanding that Applicant's Tax Ordinances do not provide or fix any rate of interest against delinquent taxes, and also for an attorney's fee of \$923.40, all without due process of law and without just compensation, contrary to the Constitution of the United States, and particularly to the Fifth and Fourteenth Amendments thereof, and which Order of Sale is the result of the Court's placing throughout these proceedings the burden upon the Objectors instead of upon the Applicant without construing said statutes and any doubts of the construction of or ambiguities in them in favor of the Objectors, and ignoring the evidence that the Applicant's assessments are not actual values but are over valuations and over assessments made by Applicant in bad faith, and admitting aliunde evidence by deposition of Dorothy Henry to modify, alter and amend the Duplicate Delinquent Tax Roll presented to this Court with Applicant's application for order of sale, and ignoring the evidence that Applicant applied, without authority of law and against Objectors' consent and contrary to their written instructions, monies paid by them in full payment of all taxes for the years 1950 and 1951 upon their respective properties at their actual values, first upon per-

sonal property taxes thereby leaving purported unpaid taxes upon Objector Yakutat & Southern Railway's real property which is to be sold under said Order, which is contrary to the law and the evidence.

This motion is based upon the records, dockets, and files of this cause and upon the Official Court Reporter's notes of the various proceedings herein, and upon the Applicant's Tax Ordinances 1, 2 and 4, which are now in the custody of the Clerk of this Court, and in regard to interest upon Applicant's admission in its brief of June 24, 1954, of the ambiguity of Section 12 of its Tax Ordinance 1; and in support thereof Objectors cite, in addition to those decisions heretofore cited to the Court, the U. S. Supreme Court decisions of *Gould v. Gould*, 245 U. S. 151, 153, and *U. S. v. Merriam*, 263 U. S. 179.

Dated at Juneau, Alaska, July 2, 1954.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

[Endorsed]: Filed July 2, 1954.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau

No. 6581-A

In the Matter of:

The Delinquent Tax Roll, Etc., for YAKUTAT,
Etc., for 1949.

LIBBY, Etc., et al.,

Objectors.

No. 6734-A

In the Matter of:

THE DELINQUENT TAX ROLL, ETC., OF
THE CITY OF YAKUTAT, ETC., FOR THE
YEARS 1950 AND 1951.

YAKUTAT & SOUTHERN RAILWAY, LIBBY,
ETC., and BELLINGHAM, ETC.,

Objectors.

NOTICE OF HEARING BY APPLICANT ON
OBJECTORS' MOTION FOR NEW TRIAL

To the Above-Named Objectors and Their Attorney,
R. E. Robertson, Esq.:

Please take notice that applicant in the above-entitled causes will call up for hearing before the above-entitled Court at its courtroom in the Federal Building at Juneau, Alaska, at the hour of 10:00 o'clock a.m. July 26, 1954, your motions for new

trial in said causes which motions were served on applicant on July 2, 1954.

July 21, 1954.

/s/ WILLIAM L. PAUL, JR.,
Applicant's Attorney.

[Endorsed]: Filed July 21, 1954.

[Title of District Court and Cause.]

No. 6734-A

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT UNDER RULE 73(b)

Notice is hereby given that Yakutat & Southern Railway, a corporation; Libby, McNeill & Libby, a corporation, and Bellingham Canning Company, a corporation, the Objectors in the above proceedings, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain Order of Sale made and entered in the above proceedings on June 29, 1954, and from that certain Order, made and entered in said Proceedings on July 28, 1954, denying their Motion for New Trial.

Dated at Juneau, Alaska, this 30th day of July, 1954.

/s/ R. E. ROBERTSON,
Attorney for Objector Appellants Yakutat & Southern Railway, Libby, McNeill & Libby, and Bellingham Canning Company.

Receipt of copy acknowledged.

[Endorsed]: Filed in open court July 30, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO
FILE AND DOCKET APPEAL

It appearing to this Court that the objecting Appellants requested the official Court Reporter on July 30, 1954, to prepare the transcript of all proceedings reported by her in the above action but that she has not yet done so and is now absent on vacation and does not contemplate returning to Juneau, Alaska, from her vacation until on or after September 10, 1954, but that Appellants' present time within which to file and docket their appeal will expire on September 9, 1954, and that it is impossible for them to so file and docket their appeal until they are furnished by the Reporter with her said transcript.

Now, Therefore, It Is Hereby Ordered that the Appellants be, and they are hereby, granted until October 10, 1954, within which to file their record on appeal and docket their appeal with the Clerk of the United States Court of Appeals for the Ninth Circuit in San Francisco, California.

Done in Anchorage, Alaska, this 31st day of August, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME TO
FILE AND DOCKET APPEAL

Objectors represent that owing to pressure of work the official court reporter was unable until October 2, 1954, to transcribe and file her transcript of all the proceedings reported by her in the above action and that the Deputy Clerk in Juneau is under such pressure of work that she will not be able to prepare and certify for inclusion in the record on appeal the above Court's record in time to reach the Honorable United States Court of Appeals for the Ninth Circuit by October 10, 1954, the praecipe for which record the Objectors filed with the Clerk in Juneau in the forenoon of October 4, 1954, and that on August 31, 1954, this Court by its Order extended the time to file and docket the appeal with the appellate court until October 10, 1954, they having on July 30, 1954, served and filed their Notice of Appeal to the appellate court, and that the 90-day period within which to file and docket said appeal will not expire until October 28, 1954, Objectors move that an Order be entered herein extending the time to file and docket their appeal in the appellate court until October 28, 1954.

Dated at Juneau, Alaska, October 5, 1954.

/s/ R. E. ROBERTSON,
Of Attorneys for Objectors.

[Endorsed]: Filed October 6, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
AND DOCKET APPEAL

Objectors having made and filed herein their Motion for an extension of time until October 28, 1954, to file and docket their appeal with the United States Court of Appeals for the Ninth Circuit, and it appearing that owing to pressure of work the official court reporter was unable until October 2, 1954, to transcribe and file her transcript of all the proceedings reported by her in the above action, and that the Deputy Clerk in Juneau is under such pressure of work that she will not be able to prepare and certify for inclusion in the record on appeal this Court's record in time to reach the Honorable United States Court of Appeals for the Ninth Circuit by October 10, 1954, the praecipe for which record the Objectors filed with the Clerk in Juneau in the forenoon of October 4, 1954, and that on August 31, 1954, this Court by its Order extended the time to file and docket the appeal with the appellate court until October 10, 1954, they having on July 30, 1954, served and filed their Notice of Appeal to the appellate court, and that the 90-day period within which to file and docket said appeal will not expire until October 28, 1954,

Now, Therefore, It Is Hereby Ordered that the Objectors be, and they are hereby, granted until October 28, 1954, within which to file their record on appeal and docket their appeal with the Clerk of

the United States Court of Appeals for the Ninth Circuit in San Francisco, California.

Done in Ketchikan, Alaska, this 6th day of October, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed October 6, 1954.

In the U. S. District Court for the District of
Alaska, Division Number One, at Juneau

No. 6734-A

In the Matter of

THE DELINQUENT TAX ROLL OF REAL
AND PERSONAL PROPERTY FOR THE
CITY OF YAKUTAT, ALASKA, FOR THE
YEARS 1950 AND 1951.

YAKUTAT & SOUTHERN RAILWAY, LIBBY,
McNEILL & LIBBY, and BELLINGHAM
CANNING COMPANY, Each a Corporation,

Objectors.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered that on the 7th day of November, 1952, court having convened at 10:00 o'clock a.m., at Ketchikan, Alaska; the Honorable George W. Folta, United States District Judge, presiding; William L. Paul, Jr., attorney for applicant, appearing; the following proceedings were had:

Mr. Paul: I have to present at this time also, your Honor, a form of order of sale In the Matter of the Delinquent Tax Rolls for 1950 and 1951 for the City of Yakutat. This is also a Juneau case. I present it at this time because it affects only those parcels of land whose owners have filed no objections. Before I left Juneau I explained to Mr. Robertson that it did not include Libby, McNeill & Libby, Yakutat & Southern Railway, or Bellingham Canning Company. [1*]

The Court: You may present it.

Thereafter on the 22nd day of December, 1952, at 10:00 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

The Clerk: The matter to come up now is No. 6734-A, In the Matter of the Delinquent Tax Roll for the City of Yakutat for 1950 and 1951, on objections.

Mr. Robertson: I suppose, your Honor, it is just coming up on the question of getting this motion set for entry of default. Under Rule 55 (b) I have to give Mr. Paul three days' notice of calling up, so I assume this time would be set for whatever your next regular motion calendar would be. I didn't expect it to be today. I presume that is the procedure. I didn't know.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Paul: This comes up for default, your Honor, on the applicant's failure to respond to interrogatories propounded by the objectors——

The Court: Didn't you have a motion?

Mr. Paul: A motion for extension of time was filed on the 19th. Since then interrogatories have been answered. They were filed this morning.

Mr. Robertson: I haven't received them this morning. [2]

Mr. Paul: They were taken over to your office about twenty minutes after nine.

Mr. Robertson: No, they weren't. I was there myself ten minutes after, in fact five, and didn't leave until twenty-five minutes after nine.

The Clerk: I have the original that was filed in the Clerk of the Court's Office this morning. They are here, and I present them at this time.

The Court: All I did was look at the motion at the top of the file, which was a motion for extension of time. I didn't know there was another motion.

Mr. Robertson: This motion was filed on the 18th. It is made under Rule 37 (d), a motion for entry of default when the person to whom the questions are propounded fails to answer, and under Rule 55 (b) I have to give three days' notice of the presentation of the motion. I served the motion on the 18th and gave this time. I presumed that at this time, I thought at this time the Court would then set it for the next motion calendar for hearing the motion.

The Court: Well, am I to understand that this

motion for extension of time is a counter motion to the one for default?

Mr. Paul: Yes; and the fact that the interrogatories have already been answered before the motion comes to hearing. My motion in defense against Mr. Robertson's motion is made [3] under the provisions of Rule 60 which relate to excusable neglect.

The Court: Well, do counsel have any time to suggest for a hearing on the motion?

Mr. Paul: I was prepared this morning, but, if counsel wishes more time——

Mr. Robertson: I haven't seen the answers. Just preliminary to taking up the motion, the statute, the rules don't give anybody the option at any time to come in and file answers. He had nearly a month. I served these on him November 21st.

The Court: We could hear them next Friday.

Mr. Paul: Perhaps a week from today then.

Mr. Robertson: That would be agreeable, your Honor.

Mr. Paul: It shouldn't take very long.

The Court: A week from today.

The Clerk: The 29th.

Thereafter on the 23rd day of April, 1954, court having convened at 10:00 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; William L. Paul, Jr., attorney for the applicant, and R. E. Robertson, attorney for the objectors, both appearing; upon the calling of the Motion Calendar the following proceedings were had with reference to the above-entitled cause:

The Clerk: The next matter is No. 6734-A, [4] In the Matter of the Delinquent Taxes for the Years 1950 and 1951, City of Yakutat, Plaintiff's Motion for setting for trial filed, and a motion, that is not on the calendar, filed the 19th, a motion for judgment on the pleadings. Mr. Paul and Mr. Robertson.

Mr. Paul: Your Honor, may we have a special setting for the motion for setting trial and on the motion for judgment on the pleadings, so we won't have to go over until two weeks, the next motion day, so we can have a trial setting as requested on the motion calendar?

Mr. Robertson: That is agreeable to me, your Honor, to take them at one time. I would appreciate it very much if it could be some afternoon next week, because in the mornings I am still pretty well stove up by the illness I am going through.

Mr. Paul: I would suggest the afternoon of the 28th. The Gilbrecht case is set for the morning. It is a very short case. I think it will be through by the afternoon.

Mr. Robertson: You mean these motions?

Mr. Paul: The motion for setting and for——

Mr. Robertson: I have to have time to get witnesses from Bellingham for trial if it is on the 7th of May.

The Court: Is 2:00 p.m. next Wednesday for hearing these motions satisfactory?

Mr. Paul: Yes. [5]

Mr. Robertson: Very well, your Honor.

Thereafter on the 28th day of April, 1954, court

having convened at 2:00 o'clock p.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

The Clerk: Next is the arguments in No. 6734-A, In the Matter of the Delinquent Taxes of Yakutat for the years 1950 and 1951.

Mr. Robertson: If the Court please, before that matter is presented I would like to call the Court's attention to the fact, I supposed it was submitted last fall, but the Court has never entered the judgment on the mandate from the Circuit Court of Appeals which I presented here last October. I think it ought to be signed, your Honor. It has never been signed.

The Court: If it was presented, it would have been signed.

Mr. Robertson: Anyhow, it is here and it has never been signed up.

Mr. Paul: I have some objections to that, your Honor, to the form of order.

Mr. Robertson: Judgment on mandate.

Mr. Paul: That is right, judgment on mandate. I [6] have just been waiting for counsel to call the matter up.

The Clerk: Hasn't the mandate ever been presented?

Mr. Paul: The judgment on the mandate is what he is talking about.

The Court: Has the mandate been spread on the journal of the Court?

The Clerk: That is the question I asked, may it please the Court. Is it in our file?

Mr. Robertson: It has been in your file since last fall.

The Court: Is the entry of a judgment here on the mandate necessary to this argument scheduled for this time?

Mr. Paul: I don't think so.

Mr. Robertson: I think it should be entered because after all it is a mandate that has come down from the Appellate Court.

The Court: Well, I understand that. The only question is whether it should be entered now, whether it is necessary to——

Mr. Robertson: I would like to have it entered, your Honor. The Appellate Court itself taxed \$719 against the City of Yakutat, which I have conversely wrote to Mr. Paul about months ago trying to make some kind of settlement or agreement about it, but I got no response from him, and it [7] seems to me only proper it should be entered.

The Court: Well, there isn't any question about it, but counsel here has said that he wants to object to it, and my inquiry was made with the view to determine whether it had to be entered before this argument could be heard.

Mr. Robertson: I think it is appropriate. I don't say it has to be.

The Court: I think maybe you should have filed

written objections to it if you wanted to object to it.

Mr. Paul: As soon as it is noticed for hearing——

Mr. Robertson: It shows there I gave him notice, over six months ago.

Mr. Paul: You have abandoned your notice.

Mr. Robertson: No; I never abandoned my notice at all.

Mr. Paul: What happened is this, that we have taken the money we have gotten and applied it to the personal property taxes and also gave him credit for his costs. That is what has happened. The form of order doesn't recognize that. I did respond to counsel when he asked me for my comments on the form of order. He just doesn't agree with my method of proceeding.

Mr. Robertson: That is the first time that I ever heard that he even applied anything on the costs, your Honor. This affidavit that he has made in a letter to the Clerk on [8] October 8th last, or a copy of which was sent to the Clerk, I don't recall in that that he ever made any such statement as that.

Mr. Paul: I did respond, and you protested most strongly, too, against my view.

The Court: Well, it will come up on the next motion day, and in the meantime you may file your objections to it.

Mr. Paul: Thank you.

Mr. Robertson: Mr. Paul sometime ago, your Honor, filed a motion to have this matter set for

hearing on May 7th. Rather in the hope that we could settle the matter, avoid, not settle, another expensive trial and perhaps reach it without having an actual hearing was really the motive of my motion for judgment on the pleadings and for a motion for a summary judgment. Possibly it would have been better if I had applied to the Court for a pre-trial hearing where we could come in and see what each party admitted and what they denied, but anyhow it comes up on those motions, on my motion at this time, your Honor, to that effect.

On September 8th last Mr. Paul wrote a letter to me, a copy of which he sent to the Clerk and which presumably is on file with the Clerk, and which presumably he considers now a part of the proceedings, although this is a statutory proceeding, and my understanding of it is that the procedure must be strictly followed because it is a derogation of the rights [9] of property owners, in which he said—he didn't say it in this letter of September 8, 1953, but I don't criticize him on that because my recollection isn't quite sure as to whether or not I had received the mandate at that time, although of course we had received the opinion of the Circuit Court reversing your Honor, and Mr. Paul long before that must have known that the Circuit Court denied his brother Fred's application for a rehearing.

Actually what he says is: "You should be advised that the City of Yakutat has applied the sums heretofore paid by Libby, McNeill & Libby and

Bellingham Canning Co., toward personal property taxes and the balance toward real property taxes. The present action therefore concerns only real property taxes. Kindly state when you will be ready for trial."

However, in his sworn affidavit, which he served on me day before yesterday and which was sworn to, according to the purported copy, on the 26th before the Deputy Clerk, he said: "Objectors have paid applicant a sum more than sufficient to satisfy their personal property taxes, and such sum has been applied by applicant to pay said personal property taxes, penalty and interest, and there is nothing due thereon; and this matter concerns," it means apparently "only" but it says "on," "real property taxes, interest and penalty."

Now, he doesn't say anything at all about having applied it, made some application of this as a credit on the [10] \$719 and some odd cents that the Appellate Court allowed as taxes against his client. I don't notice that it says in his letter anything about applying it on real property taxes, **which** seems to me it speaks an inconsistency right there as to his present statement to your Honor as to whether any objections he claims he made to me that it would apply on personal property taxes other than this letter of October 8th and going to apply the balance on this cost that was adjudicated to us by the Appellate Court.

Now, my position first is, your Honor, that this is a statutory proceeding, and the statute sets up what is to be done in order to enforce a lien against

real property taxes, and of course your Honor not only held in this last case but the Circuit Court at least impliedly upheld your Honor that this does not apply to personal property. Now, I submit he can't come in and avoid the statutory procedure with writing an informal letter to me and filing with the Clerk or filing a purported affidavit that so has been done, that that is not the statute, and you can't avoid the statute that way because it is strictly a satutory proceeding. .

We further contend, your Honor, that in making a payment on account of taxes the taxpayer has the right to direct its application to a particular tax or a particular piece or item of property, and a receiving officer is bound by such distribution, that is, if the receiving officer accepts [11] the payment, and that is in 84 of the article on taxation, 84 C.J.S., Paragraph 627, Page 1250, and also 61 C.J., Paragraph 1250, Page 970. And that rule, according to the general rule of payment, that, if a debtor makes a payment to a creditor and directs the application of payment and the creditor receives the payment, then the creditor—I don't mean to say receives—I mean accepts the payment, then the creditor is bound to apply it as directed by the debtor's request or otherwise return the money. That general rule is found on the article on payment.

The Court: Well, what isn't clear to me—have you done that?

Mr. Robertson: Yes, your Honor; I am getting right down to that to show you.

The Court: I didn't know.

Mr. Robertson: Now, in the objectors' requests for admissions, served and filed on November 21, 1952—I don't pass over these other questions, but I call these to your attention particularly because I think they are pertinent.

The Court: First I want to know—what is being argued here, what motion?

Mr. Robertson: I am arguing the motion for summary judgment and for judgment on the pleadings, your Honor, at the present time.

The Court: O.K. [12]

Mr. Robertson: I said that I wrote a letter or made a request for admissions in which I said: "With his letter of February 1, 1951, to applicant's City Clerk, Attorney Robertson, on behalf of Libby, McNeill & Libby and the Yakutat & Southern Railway Company, enclosed Libby, McNeill & Libby's check for \$1,699.20 for 1950 taxes on the Yakutat property of the Yakutat & Southern Railway at the rate of 16 mills upon a valuation of \$106,200.00, and Libby, McNeill & Libby's check for \$785.60 for 1950 taxes upon its property at 16 mills upon a valuation of \$49,100.00, which letter reads as follows:" I will not read the letter because I presume your Honor will want it to be set out in full there.

The 23rd question is: "Applicant received said letter with said two checks"—oh, pardon me. I better read the letter after all.

"Referring to my letter of the 20th ultimo, to which you have not yet replied," this is to the City

Clerk, Airmail—Registered, “relative to the undated tax bill which was recently received by Libby, McNeill & Libby from you in which was listed the following property and taxes, namely: Land \$11,000, Improvements \$176,125, Personal \$94,000, Totals \$281,125; Tax on the respective items \$176.00, \$2,818.00, \$1,504.00, Totals \$4,498.00.

“Presumably these taxes cover the property of both Libby, McNeill & Libby and the Yakutat & Southern Railway and [13] which you have failed to segregate and tax against the respective property owners for which reason you are hereby notified that my clients contend they are illegal, also that no proper or sufficient, if any, notice was given of the meeting, if any, of your Board of Equalization.

“My clients further protest and maintain that these taxes are unreasonably high as compared with taxes levied on other people’s property and that the valuations are not the actual fair or cash valuations of their properties; but that the actual fair cash value of Libby, McNeill & Libby’s property within your town on June 1, 1950, was \$49,100.00, and of the Yakutat & Southern Railway on that date was \$106,200.00.

“I enclose herewith check of Libby, McNeill & Libby in favor of the City of Yakutat for \$1,699.20 in full payment of the 1950 taxes on the Yakutat property of the Yakutat & Southern Railway at the rate of 16 mills upon a valuation of”—in copying this letter apparently the amount is stated incorrectly, one million and sixty-two; no; it is “\$106,-

200.00”—the comma is just misplaced; it is correct after all—“and also the check of Libby, McNeill & Libby in favor of the City of Yakutat for \$785.60 in full payment of the tax at 16 mills upon its property at the valuation of \$49,100.00.

“These remittances are tendered in full payment of these respective taxes, and you are requested to have your Board of Equalization meet and equalize the valuations upon [14] my clients’ respective property as hereinbefore stated and to officially accept these checks in full payment of the 1950 taxes on those properties.

“Please bear in mind that these checks are remitted for no other purpose than in full payment of the 1950 municipal taxes upon my clients’ respective Yakutat properties.”

Question 23 is: “Applicant received said letter with said two checks on or about February 2, 1951, and thereafter cashed said checks and accepted the proceeds thereof and has never returned the proceeds or any part of the proceeds of said two checks.”

“On February 3, 1951, Attorney Robertson wrote a letter to the Applicant’s City Clerk and enclosed therewith Applicant’s original tax notice, as stated in said letter, a copy of which letter is as follows:”—and in that I returned the tax notice which I had not returned with the previous letter that I read.

“On December 7, 1951, the Bellingham Canning Company wrote a letter to Applicant’s Board of Trustees with which it enclosed its check for \$2,866.35 for 1951 municipal taxes upon a valuation

of \$182,803.00 at 16 mills or a total of \$2,924.85, less 2% amounting to \$58.50, leaving \$2,866.35, the amount of the check. The following is a copy of said letter:

“Board of Trustees, City of Yakutat, Yakutat, Alaska.

Gentlemen: [15]

“Enclosed you will find our check in the amount of \$2,866.35, in full payment of our 1951 Municipal Taxes, broken down as follows: Valuation of \$182,803.00 at 16 mills, total of \$2,924.85 less 2% for full payment of taxes before December 15, 1951, amount of \$58.50, leaving balance of \$2,866.35 amount of our check.

“As the board will recall, we made a special trip to Yakutat, to meet with your Board of Equalization on October 30th. At that time we laid before your board our honest, true and actual figures, as to costs of property, and also our actual inventory costs figures, which total was \$182,803.00. At this meeting we gave you these figures in all sincerity, and were indeed greatly surprised when we received your valuations placed at \$281,625.00, where or how this was derived at we are unable to understand. Without any doubt the valuation as placed by us, is the actual valuation, and for this reason we have so based our tax payment to you. As we told your board, it will be necessary for you to resort to the courts for any additional amounts you may decide still due you.

“At the time that we met with your board, and also on different occasions, we have tried to make

ourselves clear, in that we intend to do all we can to help the City of Yakutat, not only as a city, but also the individual citizens of the town. In return we did expect the city to be fair in their dealings with us, and we are certainly in hopes that the tax [16] matter is not a cridel,"—I suppose it means a "critique"—"of the city's dealings with us. On two different occasions we have sent letters to your mayor, but have not even received the courtesy of a reply. Things like this makes it very hard for us to co-operate, even though our desire is to do so.

"We are sorry that this matter has come up during the first year of our operation at Yakutat, but do hope, that the City of Yakutat will realize our desire to help. Providing for a Christmas dinner for the people of Yakutat, is certainly indictative of our desire to help and share in the community life of your town.

"In closing we sincerely hope that we can all work together for a better community at Yakutat. May we also take this opportunity to wish you and the people of Yakutat, a very happy and joyous holiday season. Yours very truly, Bellingham Canning Company, Jeanice M. Welsh."

"26. Applicant cashed said check and accepted the proceeds thereof and has never paid or refunded any part of said \$2,866.35."

The City's attorney, Mr. Paul——

Mr. Paul: Your Honor, may I interject? Pardon me, counsel. If I had known the trend of counsel's argument, I would have insisted on the rule that he attach to his motion for summary judgment

a statement of his points. As it is, we are hearing about a "Merry Christmas" and going over the old [17] compromise arguments again. All these arguments have been made to the Court. Now that I see him doing that I think I ought to insist that he attach to his motion the points he relies on, according to the court rule. I thought he had something new. It is the same old stuff.

The Court: Well, I couldn't tell what this reading was in support of, what contention it is in support of.

Mr. Robertson: I am just laying the foundation.

The Court: Well, I think you ought to make your contention first so that——

Mr. Robertson: I contend, and I am going to read Mr. Paul's answers where he said they did accept these checks. They took these checks which where——

The Court: Well, why read them? Why not just state what was done? That is all I need.

Mr. Robertson: Well, your Honor asked me to, I understood.

The Court: No; I didn't ask you to read anything.

Mr. Robertson: Very well. I misunderstood you then. Mr. Paul answered these and said, yes, they accepted these checks, in his sworn answer before the Clerk on December 22, 1952; at least the copy served on me purported to be sworn to by him before the Clerk on that date, and I have never looked at the original, but I naturally presume it

is so; in which he admitted he received these checks with these letters. [18]

The Court: What about his statement that this is rehashing something that has already been disposed of?

Mr. Robertson: It is not rehashing anything at all, your Honor, because I am not arguing this at all on a point of the City's authority or lack of authority to compromise. I am arguing on the point that he has come in with a letter and later an affidavit stating that despite the specific application or the direction when these checks were forwarded, one for 1950 by me and the other by Mrs. Welsh in 1951, we directed the specific application of those checks, and he can't come in later, even a tax forum can't accept those checks, and later come in and say "we are applying them differently than according to your instructions."

The Court: Well, that is what the Court needs to know, is a statement of that. You don't have to read all this stuff. Just tell the Court what you contend.

Mr. Robertson: I want to make sure it is before the Court so the Court knows——

The Court: That doesn't make it clear to the Court. It just confuses it.

Mr. Robertson: Is it confusing to the Court now?

The Court: Well, you start reading something for a half an hour, and that has no meaning to me whatever, and without stating your contention first, and you can state your contention and I will take

your word for it that it is backed [19] up by the record, and then you don't have to read the record.

Mr. Robertson: Very well. I am very sorry I misunderstood your Honor, but I stated the law to your Honor, and your Honor said that the first proper procedure was to state the facts and then state the law, so I——

The Court: I don't remember stating anything of the kind.

Mr. Robertson: Well, I so understood your Honor. I take the position that even a tax forum, and that the law writers support that, that they can't come in according to his letter now and take these payments we made and say, "All right. We are going to take those payments and pay off all the personal property taxes, and you still owe us for the real property taxes which are involved in this suit." I submit that is not the law, and I also submit on the motion for judgment on the pleadings that we are entitled to a motion on the judgment on the pleadings under the Appellate Court's decision, in the previous similar case in which I was seeking to have your Honor enter up an order on the judgment on the mandate before I started my argument.

The Court: Well, now, as I understand it, your one point is that these tax payments have been misapplied, contrary to your instructions?

Mr. Robertson: That is right. They can't do it, misapply it. [20]

The Court: All right. Now, is there any other point?

Mr. Robertson: Yes. I just stated it. I am entitled to motion for a judgment just simply on the basis of the Appellate Court's decision reversing your Honor in the previous case known as the 1948 and 1949 Taxes.

The Court: Well, is this merely an application for judgment on the mandate in another form? Is that what it is?

Mr. Robertson: No. I say that I am entitled to the——

The Court: Then tell me why you are entitled to the judgment. That is what I want to hear.

Mr. Robertson: Because of the Appellate Court's opinion in the similar case where they tried to levy taxes and enforce taxes against these people for 1948 and 1949.

The Court: But was there a like misapplication there?

Mr. Robertson: That is what I submit; yes, your Honor.

The Court: I don't remember anything of that kind. I don't remember that there was ever a misapplication of tax payments.

Mr. Robertson: No. No; there wasn't a misapplication, but I have got two points here. One is that they are attempting to misapply the funds without authority, and the other is that anyhow they can't maintain this suit in view of the—— [21]

The Court: Of the lack of segregation?

Mr. Robertson: That is right; yes, your Honor.

The Court: You didn't say that. You mean there is still a lack of segregation?

Mr. Robertson: Yes, your Honor.

The Court: That is all I need to know then.

Mr. Robertson: Well, I can't tell how much your Honor needs to know.

The Court: Well, you just don't even make the point. I can't guess at it. This is the first time that I have heard of lack of segregation, and I have to suggest it.

Mr. Robertson: I can't make my argument all at one time.

Mr. Paul: May it please the Court, I can make my reply very brief. The Court may recall the previous decision of this Court in the 1948-1949 Delinquent Tax Roll, in which this Court relied so heavily upon, mainly, the inactivity that the taxpayers indulged in to an equal extent with the City. The Circuit Court of course wouldn't go for that reasoning, however cogent it was. However, the parties have just gone right ahead, that is to say, before they knew what the Circuit Court was going to say, have gone right ahead dealing in exactly the same manner in the case which is before the Court now.

Now, after the case is filed and before we hear from [22] the Court of Appeals is when the commingling was heard and the payments were made by Mr. Robertson for his client. The taxes paid were on real and personal property, for those checks that he named off, in response to the billing the City of Yakutat sent for taxes on real and personal property, commingled. We have got two categories of taxes. Actually, to separate them is merely a matter

of computation because each item of real or personal property is spelled out. For instance, in this tax roll here, as I recall, the personal property was spelled out on the delinquent tax roll—\$94,000.00. There is another item of land, which is real property.

Now, after we get this delinquent tax roll filed in this court, the Court of Appeals comes along and says, “You are both acting illegally,” so what we are doing is removing the category of personal property taxes from this proceeding. That is something in the nature of a supplemental action when an act has occurred——

The Court: Well, now, how are you removing the category of personal property from this proceeding?

Mr. Paul: We took all the money which was just generally given us for real and personal property and we applied it for the portion of the proceeding which should not be in the case, for which the City of Yakutat could not apply it—the Bellingham Canning Company on the delinquent tax roll, personal property. Now, we have that choice. Both sides [23] acted in an illegal manner, so one jumps in and tries to correct it. That is all we have done.

The Court: Well, what about his point about misapplication, at least the failure to follow the directions accompanying the remittance of the money?

Mr. Paul: In other words, the application was directed to real and personal——

The Court: He says that what you say you have done is a misapplication because it was a failure to comply with the directions accompanying the remittance. Now, what about that?

Mr. Paul: Well, his direction was to pay real and personal property taxes. He didn't send enough money, so we went ahead and——

The Court: Was it enough for the personal property taxes?

Mr. Paul: Yes. Yes, indeed. They are paid in full.

The Court: Then according to your method of procedure you have something left over to apply on real property taxes?

Mr. Paul: Yes. He didn't send enough money, because there was a dispute as to valuation of personal property and to valuation of real property, but the application was directed to be made to the personal and real property taxes according to the amount they think is the right amount. There was no [24] specific instruction for so much for personal and so much for real property, except in the sense that the categories are disputed in the amount of valuation. Our position now is that the personal property taxes, when we discovered the illegality of the activity of both sides, we applied them in the proper manner, not inconsistent with any instructions given us. The personal property taxes are all paid, and part of the real property too. Now, I don't mean to be conceding that we can take, that we can be required to apply the taxes in a certain manner. Where we have a subject so little con-

nected as the general tax program of a city, I don't think that a taxpayer can say, "Well, now it is true I owe several thousand dollars for a couple years ago on some personal property that has disappeared, and I am just going to pay my real property taxes for this year." You can't do that. When you owe taxes in general categories——

The Court: Well, suppose he disputes that there is a tax on this personal property that has disappeared, what about it then?

Mr. Paul: That is about like a case here I had the other day where I filed an appeal from the Industrial Board, and the defendant employer of course is required to pay, pay the award, unless he applies for relief from payment. He made no such application for relief. Instead he sends us a check, which in effect is going to make us dismiss our appeal. He [25] can't do that. If he tenders a check and he says only to take it, and we will get rid of a bona fide dispute, we take the check without any such provision. We disregard the provision. We get back to the old compromise——

The Court: Then you dispute his view of the law?

Mr. Paul: Yes, indeed. I want to make that clear. I do not agree with him on that compromise.

The Court: Well, then, as I understand it, your position is that by applying the money in this way that you have rendered the question of segregation or the objection of lack of segregation moot?

Mr. Paul: Yes. The fact that it has happened

since the application was filed is immaterial. It is simply facts; that is all.

Mr. Robertson: If the Court please, I can't permit to go unchallenged Mr. Paul's statement that the Appellate Court held my client did anything illegal at all. I think that is absurd and wrong, that the Appellate Court's decision held that the objectors have done any illegal act whatsoever. As a matter of fact, they not only found against his client, and they also taxed costs against it.

Just to show some of the inconsistencies here, your Honor, and since your Honor doesn't want me to read it, I would like to call your attention to Mr. Paul's sworn answers sometime in December of 1952 before the Clerk, Answer 58 in [26] which he said, "This means that Bellingham Canning Company has paid its personal property tax and total based upon a \$94,000 valuation and the balance of the tax claimed is attributed to the personalty."

The Court: Now, what is that in?

Mr. Robertson: His Answer 58, signed sometime in December, 1952.

The Court: But what is Answer 58 in, so I can locate it?

Mr. Robertson: In his answers to our interrogatories of November 21, 1952. It was signed by him sometime in December before the Clerk, in 1952. At that time they were taking the position they were going to apply the balance to personal taxes, according to this answer he gave me. And I submit there isn't any question of compromise in this case at all at the present time. If they didn't want to accept

the checks as we sent them, they should have returned the checks. They can't take them now and apply them to one particular thing that is not subject to this lien law and say that you still owe it for the real property taxes.

The Court: Well, now, what is your point in calling attention to Answer 58—to show that he is taking an inconsistent position now?

Mr. Robertson: Another inconsistent position now. His letter of September 8th, his affidavit of April 26th, and [27] this answer of December, 1952, are all inconsistent with each other.

The Court: Well, now, let's assume that they are inconsistent. Is he precluded from taking his present position?

Mr. Robertson: Yes; he is precluded, your Honor.

The Court: Why?

Mr. Robertson: Because the recipient has no right to apply those payments under the law except as directed by the debtor.

The Court: Well, I know that that is your point, but, if that is the point, there is no use of calling attention to his inconsistency because, if that is the law, he is bound by it regardless of inconsistency.

Mr. Robertson: Well, very well. I might say, your Honor——

The Court: Well, now, then, as I understand it, I will have to go into this question of segregation somewhat. I took the position previously, and I have never investigated it since, so I don't know whether my position is so unsound or not, but I

took the position at that time, and it certainly is the law, and it is the law now, that a person can waive anything, even a constitutional right, and that, when the taxpayer himself returned the property without segregation, made a return of real and personal property, that he waived the right to segregation, and I have never seen any reason for altering [28] my view, except this decision of the Court of Appeals, and I have never gone into the question but it just seems preposterous to me that a person couldn't waive the right to segregation of real and personal property.

Mr. Robertson: But we raised the point that we didn't waive it. We raised that very point.

The Court: Well, but wasn't there a return made of personal and real property without segregation? That is my recollection.

Mr. Robertson: Oh, no.

Mr. Paul: I got the impression from the Court of Appeals opinion that, in so far as attempting to collect personal property taxes by means of a lien foreclosure proceeding, to do away with it because it was in effect giving the court jurisdiction where it did not exist there before. But, as a matter of fact, I don't know why, none of the lawyers down there raised it, but in that 1948-1949 Yakutat Delinquent Tax Roll, which had gone down to San Francisco, it is perfectly possible to separate them, all those personal property items every one, of them, but apparently nobody raised the point.

The Court: I don't think you did here then either. I don't recall that you called attention to

the fact that the two species of property could be separated on the basis of the record.

Mr. Paul: It never came up. We never talked about [29] it at all.

The Court: Well, weren't you one of the attorneys on appeal?

Mr. Paul: Well, yes, but I didn't actually get down and do the oral argument or——

The Court: Well, but it seems to me a point like that would be made in the written brief.

Mr. Robertson: It was his brother Fred, and the case was not argued in San Francisco. That is immaterial. It was argued in Seattle, and his brother Fred in his brief, which counsel purports to—his brother Fred raised that very point, and that is why the Appellate Court come pretty near telling me off down there when they finally handed the decision down, but they finally said it was true—my contention. He is blaming his brother Fred. I was right there when his brother Fred was arguing very vociferously for that point.

The Court: Is there anything further to come before the Court?

The Clerk: Nothing today.

The Court: I will take this under advisement.

Mr. Robertson: I would like to ask, your Honor, that should your Honor overrule my motions that it would be a great accommodation to my people that the hearing not be held until May 10th. That is Monday. Mr. Paul has asked that it be set for May 7th. That would be a week from this coming Friday. [30]

Mr. Paul: The 10th is all right with me. The 7th, I just thought that——

Mr. Robertson: In case the Court should deny my motions and the hearing should be set—in fact, May 11th would still be better. I got a letter from Mrs. Welsh stating that she just couldn't possibly get here by May 7th.

The Clerk: What case are you talking about?

Mr. Robertson: The same suit. He has got a motion there for setting the case for hearing on May 7th.

The Court: That is on the presentation of the tax roll?

Mr. Robertson: Yes. If your Honor should overrule my motions.

The Court: Well, if the motions are denied, the case will be set for hearing May 10th at 10:00 a.m.

Thereafter on the 10th day of May, 1954, at 10:00 o'clock a.m., at Juneau, Alaska, the trial of the above-entitled cause came on for hearing before the Honorable George W. Folta, United States District Judge; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

Mr. Robertson: If the Court please, I would like to have Mrs. Welsh and Mr. Bristol sit inside the bar here. [31]

The Court: All right.

Mr. Paul: Does the Court have the official file here?

The Clerk: I thought the Court had it.

The Court: I think I returned it to you Saturday.

(The Clerk left the courtroom to obtain the file.)

Mr. Robertson: Has the Court made any official announcement in No. 6581?

The Court: About a week ago.

Mr. Robertson: Saturday?

The Court: I said about a week ago.

Mr. Robertson: I hadn't been informed of it. Your Honor told me about it personally Saturday morning in your room, but I didn't know—Mr. Lievers told me he hadn't received it.

The Court: Oh; I had in mind another case. That was decided Saturday morning. I don't know why the Clerk didn't notify you.

Mr. Robertson: The way that Mr. Paul sought to apply the costs in that case was overruled; was that it?

The Court: Yes. Well, I don't suppose we need the file here in order for counsel to outline their cases, do you?

Mr. Paul: May it please the Court, the testimony to be adduced by the applicant will be very, very simple. We will simply have the City Clerk identify the duplicate [32] delinquent tax rolls for the appropriate years which are attached to the application. The evidence will show that the taxes we claim due are not yet fully paid and on the

reality we are entitled to an order of sale. And that constitutes our case in chief.

The Court: I should think that you would be able to stipulate that the taxes haven't been paid. Can't it be stipulated?

Mr. Robertson: Well, we don't contend that we have paid any tax except as we alleged in our pleading, your Honor.

Mr. Paul: Well, then I don't think there is any dispute as to the amounts paid or valuations claimed by the objectors or the valuations claimed by the City. All those figures are simply in the record. With that we think we are entitled to an order.

If it comes to the point of receiving evidence from the objectors, we are going to object to the introduction of evidence on the ground that they have not exhausted their administrative remedy, in so far as Libby, McNeill & Libby and Yakutat & Southern Railway are concerned. They have made no appearance before the Board of Equalization. In the absence of that, it is our position that they cannot now come to court because they haven't complied with exhausting their administrative remedy.

In so far as Bellingham Canning Company is concerned, [33] the successor, we are going to object to the introduction of any evidence by them on the ground that there is no factor that they can be substantially injured. There is just a dispute in valuation. That is all it is. Unless they can show that there is some factor that we have overlooked, such as the Court discovered in the Chilkoot Case, why the findings were made by the Board of Equali-

zation, and this Court has nothing to do in the absence of any showing of a substantial injury. In other words, our position is that a dispute is simply a dispute and it does not constitute a substantial injury.

Incidentally, the Bellingham Canning Company did appear before the Board of Equalization. While the proceeding was informal, in so far as taking sworn testimony and things like that, still they did make an appearance and presented evidence. In that sense they went further than Libby did. Libby simply submitted claims wholly unsupported by evidence. Of course the Board has to take that into consideration because the Court has to consider evidence, not merely claims.

The Court: I don't understand what you mean by "claims."

Mr. Paul: They claim the property is worth less than what it was assessed at. It is a bare, naked claim—a dispute, you might call it—and Libby didn't give the Board anything to go upon to support their claim. Hence, I say, we are entitled to ignore the claim. They have got to present [34] evidence to help the Board.

The Court: Who is it that you say did not appear before the Equalization Board?

Mr. Paul: Libby, McNeill & Libby and Yakutat & Southern Railway did not appear; they did not present evidence; they merely presented a claim unsupported by any evidence. Bellingham Canning Company did appear.

Mr. Robertson: We contend, your Honor, that

this is a statutory proceedings and must be strictly construed, and it is incumbent upon the City to prove all the jurisdictional steps necessary to maintain this proceedings; that they will be unable to make that proof; and that necessarily they, therefore, cannot obtain an order for the sale of the objectors' property.

Furthermore, we contend your Honor, and we think it will clearly show, that the decision of the Appellate Court in the 1948 and 1949 Case is absolutely the rule of law that controls this particular proceedings, and that this proceedings necessarily must fall because it has the same defect as the 1948 and 1949 proceedings are concerned. We don't admit, to the contrary we contend, and we think the evidence will so show, that there was no assessment whatsoever of either of these objectors' property, any valid assessment, made in either the tax year 1951, or the tax year 1951; also that it will appear from the evidence not only that the Appellate Court's [35] rule is or decision governs this proceeding, but also, as a matter of fact, that that decision is *res adjudicata* of this proceeding. That will take evidence to disclose, but the other will stand apparent upon the record.

We also maintain that these valuations which the City has put or claims on the property are unjust valuations and that, regardless of whether or not for 1950 either Libby or the Yakutat & Southern Railway appeared before the Board, that the tax value of their property still must be based upon the law of actual value, so that they can't just come in because someone didn't come before the Board,

and on the contrary we protested it and tried to show them what the proper value was. They can't just put on any value they want on and maintain that value. Of course in 1950 both Mrs. Welsh and Mr. Bristol appeared before the Board on behalf of Bellingham Canning Company and the Yakutat & Southern Railway.

We also think, your Honor, that the records will show, or the evidence will show, rather, that the Board of Equalization and the Town Trustees did not follow their own ordinances, and that they are bound by the ordinances just like the public is until they amend it or change those ordinances. And in 1951, the evidence will show that the Board of Trustees made the valuation; there was no assessor; and that they didn't amend that ordinance. They did that right directly in violation of provision three of their own ordinance, [36] Section 3 of their own Ordinance No. 1, which was not amended until after that authorizing the Board to make it, and the fact that they set up a resolution or an ordinance establishing certain procedure, even though that under the law they can act as assessors themselves, but, if they create a procedure and appoint someone, then they are bound by that.

And we submit, your Honor, that the evidence go in, and the burden in the first place and duty is on the City to establish the jurisdictional steps, which is before this Court in this matter.

Mr. Paul: I am going to object to a good many points counsel makes, your Honor, but I suppose the best time to do it is when he offers the evidence.

The Court: What about his statement that the burden is on the City to establish jurisdictional steps?

Mr. Paul: Far from it; just the opposite.

The Court: Well, I just wanted to know whether you agreed with it. Now, that brings us down to the case itself. As I understand, there is no issue then here so far as your case is concerned. Am I correct in that?

Mr. Robertson: I don't get that.

The Court: I say, as I understand it, the facts constituting the plaintiff's case, or the City's case *prima facie* are not in dispute here.

Mr. Paul: In other words, does the application look [37] like a regular application for an order?

The Court: Yes.

Mr. Robertson: I challenge that right at the start, your Honor.

The Court: Well, but you challenge it on the ground that you feel that they have to show that each jurisdictional step has been taken.

Mr. Robertson: That is right.

The Court: Well, but I don't agree with that. So, with that ruling, now where does that leave us? Is it necessary now for the City to put on any evidence or shall we go on with your objections?

Mr. Robertson: I think they have got to get before this Court their delinquent tax roll in the first place.

The Court: Well, but that part of it may be agreed to. There is no use of doing something

superfluous here. Unless there is some real dispute, why, they may introduce their tax roll, and then, unless you have something to call attention to, it seems to me that there is nothing else that would——

Mr. Robertson: Let him offer it. I want to make my objection to it, your Honor. [38]

Applicant's Case

DOROTHY HENRY

called as a witness in behalf of the applicant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Paul:

Q. Your name is Dorothy Henry?

A. Yes, sir.

Q. And you are the present City Clerk of the City of Yakutat? A. Yes.

Q. You brought your records with you; have you? A. I have.

Q. This morning did you have an occasion to look over those records and see any document in there which appears to resemble this one? You can come down and look at it. A. It looks like it.

Q. Is this the duplicate delinquent tax roll of your city as appears from your records?

A. Will you please repeat that again?

Q. This document in the official file, does that appear to be a duplicate of what you find in your files? A. It appears to look the same.

(Testimony of Dorothy Henry.)

Mr. Paul: We will offer the duplicate delinquent tax roll in evidence, your Honor.

Mr. Robertson: I object to it, your Honor, as incompetent and irrelevant. The duplicate tax roll presented [39] in the application here is in the exact form of the duplicate tax roll before this Court and the Appellate Court in the previous case in this court, No. 6581-A, in which the Appellate Court held that it was invalid and said so, as your Honor knows——

The Court: Let me understand—that case involved the tax for what year?

Mr. Robertson: 1948 and 1949.

The Court: And this is for '50 and '51?

Mr. Robertson: 1950 and 1951, the two succeeding years. If your Honor will check with the printed record on Page 6 for the duplicate delinquent tax roll for 1948 and 1949, you will note that the form of this duplicate delinquent tax roll for 1950 and 1951 is prepared in the same, in exactly the same form as it was that year. The one in 1948 and 1949, as I said, was before your Honor and before the Appellate Court, and the Appellate Court said that “The difficulty, however, is that the amount of taxes, penalty and interest due upon the realty alone is not shown in the record. If the amount were separately stated in the delinquent tax roll filed by the city with its application for order of sale, it would be presumed that the realty was properly assessed and that the amount stated remains unpaid,” and for that reason the Appellate

(Testimony of Dorothy Henry.)

Court reversed your Honor and held that the proceedings were invalid, and I submit it is identically the same form in every [40] respect as the one for 1950 and 1951.

The Court: I don't recall that the decision went to anything like that. I thought the decision went to the fact that foreclosure was attempted under the lien provisions applicable to real property. I didn't know the Court decided anything as to the assessment roll itself.

Mr. Robertson: Well, I just read it to your Honor. Does your Honor challenge my——

The Court: But did the Court make any decision, or was it just a comment of the Court?

Mr. Robertson: Why, no. The Court went right along and knocked it out. It said: "But the taxes due upon the realty and personalty were 'lumped' and stated in a single amount. This is the same as no statement at all, since there is no basis for allocating any part of the amount stated to the realty. If the realty and personalty of appellants were ever separately assessed, as the statute requires, that fact does not appear in the record. Since there is nothing in the record to indicate, and no basis for a presumption that the realty was properly assessed, or, if properly assessed, that any specific amount of taxes thereon is unpaid, the City has made no case against appellants. No part of the order can stand."

The Court: Well, that is because of course of the nonapplicability of the lien provision. But,

(Testimony of Dorothy Henry.)

now, is this [41] assessment roll that we have before us here the same so far as these defects are concerned?

Mr. Robertson: Absolutely; the same form.

Mr. Paul; No; it is not the same form, your Honor.

The Court: I don't know how counsel can be disagreed on something as simple as that.

Mr. Paul: On Page 10 of the printed record that went to the Court of Appeals we find the duplicate delinquent tax roll that was used in the preceding case; just as counsel states, it does say in general terms "Tax Delinquent in 1948." That is the only description of any property. In other words, it is really no description at all in the sense of separating personalty and realty. Now, there was a similar document, as appears, and that is what I am offering here, used in another aspect of the 1948-1949 Case. But when it came down to Libby, McNeill & Libby we turned out a special one which did not split up the personalty and realty, and so in that sense, why, the Court of Appeals, trying to save this Court's decision for the City, ran into the difficulty of this special delinquent tax roll that we used for Libby which did not split up the personalty and realty. However, this one does split up the personalty and realty, and we have withdrawn the personalty from this action altogether. It appears in the printed record at Page 10 of that case.

The Court: You mean that you have withdrawn

(Testimony of Dorothy Henry.)

any [42] claim for personal property taxes from this case?

Mr. Paul: Yes. They gave us enough money and directed us to pay personal and real property taxes and, when we discovered that the proceeding was irregular in the sense of asking for an order of sale on personal property, we then applied all the money toward extinguishing the personal property taxes first, and then there was some left over for the real property taxes.

The Court: Well, but aside from that, if the money had not been so applied, what have you to say as to the point made by counsel here that the two assessment rolls are practically identical so far as the defects pointed out?

Mr. Paul: I think he is mistaken on the identify idea, your Honor. Plainly, the Court of Appeals was attempting to save this proceeding when it went into the discussion of how, if it were possible on the face of the record, to separate the personalty and realty, and they came to the conclusion that it wasn't possible because the record wouldn't permit it. It doesn't show how much is personalty and how much is realty. And so, I think it is perfectly proper for us here, if we can show on the record the impossibility of separating the personalty and realty, that we can proceed for the sale of the realty only. There would have been no purpose for the Court of Appeals to go into the discussion of what the record showed unless the Court was trying to find some [43] basis for saving the proceedings.

(Testimony of Dorothy Henry.)

The Court: Well, what is going to show the segregation here? What part of the record is going to show that?

Mr. Paul: The duplicate delinquent tax roll. Then, it says: "Land, \$11,000; Frame Buildings, \$176,000; Personal, \$94,000." Now, that, in the former case that wasn't done. As Page 10 of the record indicates, this was the style of the duplicate delinquent tax roll, which is entirely different than the one we are considering now.

The Court: Well, then, in what respect is it claimed on behalf of the objectors here that this particular roll is defective?

Mr. Robertson: Your Honor, I challenge counsel's statement. The delinquent tax roll in the previous case, 1948 and 1949, which was before the Court was headed "Delinquent Tax Rolls for 1948 and 1949."

The Court: Well, as I understand it, then your objection is based on the fact that, notwithstanding that in the first column there may be a reference to real and personal property, the tax, penalty and interest are not segregated as to the items in the first column?

Mr. Robertson: Your Honor, now I want to point out something else first. This is the delinquent tax roll which is now before the Court and which is in the same form, just made out in the same way. Now, I submit, when the Appellate [44] Court used the words "delinquent tax roll" in their decision, they were talking about the delinquent tax roll, and

(Testimony of Dorothy Henry.)

it said that "If the amount were separately stated in the delinquent tax roll." Now, what Mr. Paul has called to your Honor's attention on Page 9 and 10 of the printed record is simply the notice. It isn't the delinquent tax roll at all. It is a notice like he has got a notice at the top of this, and it is true that in there, in their notice, that he pointed out, but that is not their delinquent tax roll. The delinquent tax roll is just what I have just shown to your Honor, which was before the Appellate Court. I submit they are in exactly the same form.

The Court: Well, it seems that the roll doesn't conform to what the Court held it should be in so far as segregation is concerned, segregation of tax, penalty and interest.

Mr. Paul: Your Honor, when counsel refers to Page 6 that is the delinquent tax roll that he says is like the one we have before us now, but, when we look over that roll, we don't find Libby, McNeill & Libby and Yakutat & Southern Railway. In other words, we had two duplicate delinquent tax rolls. So, when he says these two rolls—the one I am offering in evidence now, and the one in the former case—being exactly the same style, that is true except when we get to Libby. Libby had a special one, which appears at Page 10. [45]

The Court: But I don't get the significance of that. Now, suppose that Libby's was different, then how does this change the situation?

Mr. Paul: Because it is impossible to segregate

(Testimony of Dorothy Henry.)

the Libby delinquent tax roll in so far as tax on realty and tax on personalty because there is no basis for computation on the Libby delinquent tax roll. Now, that is what the Court was looking for, some basis upon which a mere computation could be made, permitting an order of sale to exist on realty only. It just happens that that Libby one didn't split it up like the other rolls, and so there is no basis for computation in the record. Now, as I say, the discussion of the Court of Appeals is plainly directed to finding some basis to split it up, and thereafter it is only a matter of computation, so many mills times \$146,000 real property valuation. That is all it is.

The Court: Well, your position is that in so far as the record shows a segregation that the roll need not; is that it?

Mr. Paul: Need not. It is not a fatal defect, if the personalty and realty taxes and the interest are lumped, if there is some segregation at some time so that we can simply by a matter of computation make a new computation.

The Court: But how is that going to get into the record here? How is a necessary basis for this computation [46] going to get into the record?

Mr. Paul: Well, I am offering that basis for computation now. We will be eliminating the \$94,000 for personal property from this proceeding, and thereafter it will be so many mills times the assessed valuation of the real property. That is all.

(Testimony of Dorothy Henry.)

The Court: Well, it may be admitted subject to the objection.

Mr. Robertson: I also take the position, your Honor—I didn't quite get whether your Honor ruled on it or not—of course I take the position that the ruling that your Honor made in No. 6581-A also would necessarily apply, that they can't apply this \$719 figure for costs from the Appellate Court in No. 6581-A in this case. And, furthermore, that you can't apply any of the money paid for taxes contrary to the direction of the debtor, and it is admitted in this case that the debtor directed the application of this money as to what was done. He paid the taxes in full. He didn't say you could pay \$94,000 personal property taxes and, if there was anything left over, for real property. It was paid in one sum, and there is admissions in this record that they received those checks. They didn't return the checks to the payors.

The Court: Well, I understand your position, but I have got to get along with this case. It can't be in the argument stage here forever. The objection is overruled, and [47] the roll may be admitted.

Mr. Robertson: I can't see the necessity of going to tremendous expense in this case taking an appeal, and it seems to me right now this case, and in view of the Appellate Court's ruling, right now that case ought to be, this particular proceeding should be dismissed.

The Court: But what about his point, which

(Testimony of Dorothy Henry.)

seems to be sustained here by the record, that there is a segregation possible?

Mr. Robertson: He hasn't shown to your Honor how he could do it except by himself saying that of course he could have gone down to the Appellate Court and told the Appellate Court how to do it, write it up. He has got to have some law for it, not just the attorney on one side taking it up on one side.

The Court: It seems to me that the Appellate Court's opinion intimates that, if there was sufficient evidence in the record from which that computation could have been made, it would have been saved, so the roll may be admitted subject to the objection.

Mr. Robertson: Will it be marked as an exhibit?

The Clerk: It will be marked as Petitioner's Exhibit No. 1.

Mr. Robertson: That also goes to my objection that they have to prove the jurisdictional steps first, your Honor? [48]

The Court: Well, I have already ruled on that.

Q. (By Mr. Paul): Mrs. Henry, have you brought the assessment books with you?

A. I have.

Q. Does Mr. Robertson have them?

A. It is in that box that I brought.

Mr. Robertson: I haven't had a chance to look at them, Mr. Paul.

Q. (By Mr. Paul): Can you come down here,

(Testimony of Dorothy Henry.)

Mrs. Henry, and find Libby, McNeill & Libby, and Yakutat & Southern, and Bellingham?

A. For when?

Q. The tax year for 1950-1951. Didn't we mark it here? A. It is No. 5.

Q. Well, now, this is for Page No. 5.

Mr. Robertson: What year is that, Mr. Paul?

Q. (By Mr. Paul): This date here describes the tax year, does it? A. Yes.

Q. 1948-1949. Now, I see Libby, McNeill & Libby marked down as 1950-1951. In so far as you know, are these the official records of the City of Yakutat? A. In so far as I know.

Mr. Paul: I don't suppose we need to introduce the whole book, your Honor. I can simply read into the record [49] here—I propose to read these items——

Mr. Robertson: Well, I object to that, your Honor, and particularly until it is first established that there was an assessor appointed, that the assessor took the taxes, and that the assessor made the appraisements.

The Court: I don't even know what that record is, or what it purports to say.

Mr. Paul: This is the assessment book, your Honor, and I thought that I would read, in place of introducing the whole book, the segregation items and the millage rate applicable.

Mr. Robertson: Well, your Honor, it is also inconsistent with the delinquent tax roll which your Honor permitted in evidence subject to objection

(Testimony of Dorothy Henry.)

in that the only assessment in there is against the Bellingham Canning Company. There is none against Libby, McNeill & Libby at all.

The Court: Would it be inadmissible for that reason? I don't think so.

Mr. Robertson: Their own ordinance and also the statute says it must be assessed against the person who owns the property, and the Bellingham Canning Company didn't own a stick of property there in June 1, 1950.

The Court: That will have to be a matter of defense. Objection overruled.

Mr. Paul: Libby, McNeill & Libby, and Yakutat & [50] Southern Railway, Board Valuation, 1950-1951, Land, \$11,000; Improvements—

Q. (By Mr. Paul): Maybe you can read this better than I can, Mrs. Henry. The next item, Improvements, what is that figure?

A. It looks like \$176,125.

Q. And the next item? A. \$94,000.

Q. Well— A. Personal, \$94,000.

Mr. Paul: 16 mills. February 2, 1951, Payment, \$2,484.80. Libby, McNeill & Libby, and Yakutat & Southern Railway, 1951, Board Valuation—that is the same as the year before. 16 mills. December 7, 1951, Payment, \$2,866.35. That is all that appears.

Mr. Robertson: It seems to me if—is that part of a page that you are reading from, or what?

Mr. Paul: What is in the payment column. That is all I read.

Mr. Robertson: Well, I object to the whole

(Testimony of Dorothy Henry.)

thing. I can't see how you yourself have interpolated. I will submit probably it does—but Libby, McNeill & Libby, the words are read ahead of the year 1949 and not ahead of 1950 or 1951, except that all of them are that way.

Mr. Paul: Yes. I have interpolated twice, [51] as a matter of fact, where there was a blank space. My interpolation was plainly the description of what should be in the blank space.

Mr. Robertson: Well, that is his conclusion, but I think the whole thing ought to go in. The record doesn't show it officially, I submit. It isn't our fault if they don't keep their records correctly.

Q. (By Mr. Paul): That is all that appears on Libby, McNeill & Libby here?

A. In that book?

The Court: Well, if there is a dispute as to what that shows, I think you better introduce it, that particular sheet, that page; that is, you may introduce the book limited to that particular sheet or page only.

Mr. Paul: Yes. Then we might have Winter & Pond make a photostatic copy so the book can be released; is that satisfactory?

Mr. Robertson: Very well.

Mr. Paul: Very well. I will offer it in evidence.

The Clerk: Petitioner's Exhibit No. 2.

CITY OF YAKUTAT
TAX AND ASSESSMENT ROLL 1905

190

| 1948 | Owner's | Valuation | Tax | Date | Payment |
|--------------|---|------------|-------------|-------------|---------|
| | | Assessor's | Rate | | |
| Land | 11000.00 | | | | |
| Improvements | 5000.00 | | | Dec 11 1904 | 16.31 |
| Personal | 2000.00 | | | Mar 9 1905 | 5.56 |
| TOTAL | | | 3.263 3/4 | | |
| OWNER | Libby McNeil Lilly & Co. Yakutat Alaska | | | | |
| 1949 | | | | | |
| Land | 11000.00 | | | Dec 12 1949 | 17.51 |
| Improvements | 17000.00 | | | | |
| Personal | 7400.00 | | | | |
| TOTAL | | | \$ 3,755.00 | | |
| OWNER | ADDRESS | | | | |
| 1950 - 51 | | | 16 mill | 2/2/51 | 2484.80 |
| Land | | 11,000.00 | | | |
| Improvements | | 17,000.00 | | | |
| Personal | | 7,400.00 | | | |
| TOTAL | | | 4498.00 | | |
| OWNER | ADDRESS | | | | |
| 1951 | | | 16 mill | | |
| Land | | 11,000.00 | | | |
| Improvements | | 17,000.00 | | 12/7/51 | 2866.35 |
| Personal | | 7,400.00 | | | |
| TOTAL | | | 4506.00 | | |
| OWNER | ADDRESS | | | | |

EXHIBIT NO. 2
RECEIVED IN EVIDENCE
MAX 10 1954
CLERK
INCORPORATED

Yakutat



(Testimony of Dorothy Henry.)

The Court: Now, you are offering that for what page?

Mr. Paul: Page 5.

Q. (By Mr. Paul): Now, Mrs. Henry, can you explain this other book here?

A. This one is for Bellingham Canning Company, and for [52] Yakutat & Southern Railway. The land——

Mr. Paul: Perhaps counsel would like to see the entire page.

A. This whole page is for Bellingham Canning Company and Yakutat & Southern Railway.

Mr. Robertson: What is it? What do you call that page? A. Roll No. 4.

Mr. Robertson: I don't understand this. Is this for the tax years 1952 and 1953?

A. '52-'53, '53-'54.

Mr. Robertson: What is the purpose?

Mr. Paul: I don't see now that there is any purpose at all.

Mr. Robertson: You mean it is subsequent to this controversy, for two subsequent tax years?

Mr. Paul: Yes. We won't offer this. You can resume your chair (addressing the witness). I think we can stipulate as to the time when Bellingham Canning Company bought the cannery, can't we?

Mr. Robertson: Yes.

Mr. Paul: When was it; May, 1951?

Mr. Robertson: May 5, 1951.

Q. (By Mr. Paul): Is that why the name Bel-

(Testimony of Dorothy Henry.)

lingham Canning Company appears on the delinquent tax roll? [53]

Mr. Robertson: That is, of her own knowledge.

Q. (By Mr. Paul): Well, do you know why the assessment book mentions Libby, McNeill & Libby and Yakutat & Southern Railway and yet Bellingham Canning Company is the one on the delinquent tax roll that is in court here?

A. Well, I wasn't Clerk at the time, but I can answer it to the best of my ability.

Q. Go ahead.

A. At the time the City was incorporated I believe it was Libby, McNeill & Libby, and then shortly afterwards it became Bellingham Canning Company. Now, I was not in Yakutat at the time.

Q. So, on this particular page that we have introduced in evidence here, Plaintiff's Exhibit No. 1, the same property was simply carried on——

A. That is it.

Q. ——oh——Plaintiff's Exhibit No. 2.

Mr. Paul: That is all.

Cross-Examination

By Mr. Robertson:

Q. Mrs. Henry, did you bring, in response to my subpoena duces tecum did you bring the official minutes of the Board of Trustees and the Board of Equalization?

A. Yes; I have them there. [54]

Q. I want to check with a copy I made.

(Testimony of Dorothy Henry.)

A. Any particular item?

A. I want to check a minute. How long have you been in custody of this official minute book, Mrs. Henry? A. June 1, 1953.

Q. During that time have you or to your knowledge has anyone made any changes or alterations in this book or in its minutes for the period commencing with the first entry on October 2, 1948, page 50, and the entries on page 204 of the book?

A. As far as I know, no one has made any entries.

Q. When did you say you took over?

A. June 1, 1953.

Q. Since June 1st? A. Yes.

Q. Since June 1, 1953, have there been any minutes entered in this book that in anywise directed or attempted to direct the application of the payments that Libby, McNeill & Libby made on behalf of themselves?

Mr. Paul: Your Honor, I will object to that. That is entirely a matter of proceeding in court, and I have made the commitment, and it is binding. Whether the City actually goes through the formality of adopting a resolution, I think it is wholly immaterial.

The Court: I don't think I got the purport of the [55] question.

Mr. Paul: He is looking for a resolution which, you might say, is to this effect, that of the, say, \$2,400 received from Libby, McNeill & Libby or Bellingham, since the receipt it has been directed

(Testimony of Dorothy Henry.)

to be paid to extinguish the personal property taxes. That is what he is looking for, and I can tell him right now he isn't going to find it because the choice is made as a matter of court procedure. I have done it.

The Court: Then there is no use of looking for it if it isn't there, I presume.

Mr. Robertson: Is that true, Mr. Paul, both for the payment made for the use of 1950 taxes by Libby on behalf of itself and Yakutat and that the Bellingham Canning Company paid for 1951 on behalf of itself and Yakutat?

Mr. Paul: Yes; that is correct. There has been no formal resolution.

Mr. Robertson: And would you also agree that no such resolution or ordinance had been enacted prior to that time?

Mr. Paul: Yes.

Mr. Robertson: Sometime ago, about a year ago last fall, Mr. Paul got this book down for me, your Honor, and at that time I had a copy made of all of the minutes of it, from the page 50 up to and including the then last page, page 204, and I have a copy of those minutes, typewritten copy, which [56] I wonder if you would agree it could be put in evidence?

Mr. Paul: I agree.

Mr. Robertson: They are not certified by anyone except before a notary public, one of my secretaries.

(Testimony of Dorothy Henry.)

The Court: If he agrees, if he has no objection to it, it wouldn't make any difference.

Mr. Paul: I think counsel gave me one once and I looked it over.

Mr. Robertson: Yes, I think I did.

Mr. Paul: I want to preserve the point, however, that—as I recall, those excerpts were directed to show lack of appointment of an assessor, lack of qualification of an assessor that was appointed, show the receipt of a letter of claim by Libby, McNeill & Libby—I am going to preserve my point that I think that those actions do not violate any substantial right of the taxpayer, because, first, the board acted as its own assessor, which they can do; they don't have to have someone specially appointed; and, secondly, in so far as the receipt of the money upon condition, that is the old compromise idea and is not binding on the city at all.

The Court: You object then to the—to what?

Mr. Paul: To the excerpts; and they aren't going to go to prove anything in the case. I admit that they are true copies.

The Court: Well, but it seems to me that, if you [57] agree, for instance, that a tax assessor was or was not appointed, that is all you need; then you don't have to have any documentary evidence of that if you can stipulate.

Mr. Robertson: I didn't hear that.

The Court: I say, if you can agree on whether an assessor was or was not appointed, then it is not necessary to introduce any records of this kind.

(Testimony of Dorothy Henry.)

Mr. Robertson: I didn't know Mr. Paul would so agree. Will you agree that these minutes show that there was no assessor appointed for the tax year commencing June 1, 1951, that the board itself acted, although Ordinance No. 1 at that time had not been amended for the City of Yakutat, also that the same tax assessment for the tax year 1950 was simply adopted for the same tax year, the same tax valuation for the tax year 1949 was adopted pro forma for the tax year commencing June 1, 1950, and that there was no assessor appointed, at least until after the council had acted, when Mr. Williams was apparently appointed sometime late that fall.

Mr. Paul: Yes, we so stipulate, your Honor. The board acted as its own assessor.

Mr. Robertson: Both years?

Mr. Paul: Both years.

The Court: 1950 and 1951?

Mr. Paul: Yes.

The Court: The years involved here? [58]

Mr. Paul: Yes; the years involved here. That is what is reflected on Plaintiff's Exhibit No. 2.

Mr. Robertson: And that they simply used the same tax valuation for the tax year June 1, 1950, as they had used for the tax year June 1, 1949?

Mr. Paul: It was carried on, yes; the identical figures. Well, no; just a moment. Oh, '48. No; it was fixed at \$281,000 in 1949, and that was carried over in '50 and 51.

Mr. Robertson: Now, Mr. Paul, will you stipu-

(Testimony of Dorothy Henry.)

late—it is true, as the Court has ruled, that these points are not jurisdictional, but I would like to present evidence or at least make an offer of evidence, and it will be easiest and quickest if Mr. Paul will agree to it; I don't know whether he will or not; but there was—that the Board of Trustees of the City of Yakutat did not officially or by any recorded records of official action designate the assessor or any other official of the city to post any notice for the presentation of this particular delinquent tax roll to this Court?

Mr. Paul: Your stipulation goes to a special appointment, appointment by a special document?

Mr. Robertson: That there is no official record in your minute book of any such designation by the Board of Trustees or anyone to post, or any notice of presentation of this delinquent tax roll.

Mr. Paul: The only official record will be that item [59] which shows the adoption of Ordinance No. 1.

Mr. Robertson: What?

Mr. Paul: The only item appearing in the minute book will be the record showing the filing and approval of Ordinance No. 1, in so far as appointing anyone to post a notice.

The Court: Well, you mean there is a general provision in that ordinance?

Mr. Paul: Yes; authorizing the clerk.

Mr. Robertson: Well, Mr. Paul, this book does not, if my memory serves me right, does not show the adoption of Ordinance No. 1; but will you stipu-

(Testimony of Dorothy Henry.)

late with me that true and correct copies of Ordinance No. 1 and No. 2 are in the printed record in the former case?

Mr. Paul: Yes.

Mr. Robertson: You agree now that is the only official action of designation of any assessor or anybody else to give notice of presentation of your Exhibit 1 to this Court?

Mr. Paul: Yes; in so far as these two tax years are concerned.

Mr. Robertson: In so far as what?

Mr. Paul: In so far as the present proceeding, the two tax years.

Mr. Robertson: And that you did not publish in any daily or weekly newspaper in the City of Juneau, Alaska, or elsewhere, as required by Section 10 of the City's Ordinance [60] No. 1, a notice that the Board of Trustees had fixed the rate of tax levy for either the tax years 1950 or 1951, designating the number of mills fixed on each dollar of assessed value of the property assessed, and that the taxes were then due and would be delinquent on or before the 15th day of September of either of said tax years 1950 or 1951.

Mr. Paul: That is right.

The Court: Now, you are reading from one of your objections, I presume.

Mr. Robertson: Yes, your Honor.

The Court: Just give me the number of that.

Mr. Robertson: I first read from my Objection No. 1.

(Testimony of Dorothy Henry.)

The Court: I mean this last one.

Mr. Robertson: This is Objection No. 2, your Honor. And the third is that there is no official action indicated in the record book or minute book of any kind of the Board of Trustees designating the place where or the date when this delinquent tax roll, Exhibit 1, should be presented to this Court.

Mr. Paul: Right.

Mr. Robertson: That is No. 3, your Honor. No. 4, that the City's Board of Trustees did not in any manner direct the time when said delinquent tax roll should be made up; no official tax record of that.

Mr. Paul: No. That is right. [61]

Mr. Robertson: Will you further stipulate to Objection No. 9 that neither the City's clerk nor any of its officers within ten days after posting of said notice, or at all, mailed to the Bellingham Canning Company, to whom the real property by said delinquent tax roll purportedly is assessed and whose last known and present address is and was known to said clerk and City to be Yakutat, Alaska, or to either Yakutat & Southern Railway or Libby, McNeill & Libby, although both of their last known and present addresses are and were well known to said clerk and City, or otherwise, notwithstanding neither City nor any of its officers published any notice in any newspaper whatsoever? Now, would you agree to that?

(Testimony of Dorothy Henry.)

Mr. Paul: Well, your idea is that within ten days after the posting of the notice we did not mail a notice to Bellingham?

Mr. Robertson: That is right; or, if you did publish it in some other newspaper of which we have no knowledge, and it is now admitted you haven't, you didn't mail any.

Mr. Paul: The only notification we gave was the posting of the notice, one of which was on this property involved here.

Mr. Robertson: That is the only notice you gave.

Mr. Paul: That is the only notice.

The Court: Well, then, am I to understand that Objection No. 9 has been admitted? [62]

Mr. Paul: Well, your Honor, one of the notices themselves was right on this piece of property which is the subject of taxation here.

The Court: Well, then, you better restate the qualification of this objection, that the only notice was given—what?

Mr. Paul: By posting notices, one of which was on the property here involved. In other words, there was no personal delivery, except that the notice was on the property. There was no mailing, and there was no publication in a newspaper.

The Court: But, as I understand it, there was the posting of notice on one of the properties, is that what you said, or the properties of one of the parties?

Mr. Paul: One of the notices on the property about which we are involved here.

(Testimony of Dorothy Henry.)

Mr. Robertson: Pardon me just a moment.

Mr. Paul: Did you bring the ordinance book?

Mrs. Henry: No. It is over in the hotel. I didn't think you wanted it.

Mr. Robertson: In May, 1953, Edward G. Johnson in his sworn amended answers to Objectors' Interrogatories said in answer to Question 56—"Identify each building that is included in or intended to be covered by the words 'frame buildings \$176,625.00' in said item mentioned in Interrogatory No. [63] 54." Answer: "The item 'frame buildings, \$176,625' are those buildings appearing on the land now owned by Bellingham Canning Company. The same segregation was made as appears in the evidence in that certain cause entitled "In re Yakutat Delinquent Tax Roll for 1948-1949." I offer that in evidence.

Mr. Paul: O.K. No objection.

Mr. Robertson: That is Mr. Johnson's amended sworn answer, your Honor, under date of May 8, 1953, to Objectors' Interrogatories of November 21, 1952.

The Court: It will be admitted.

Mr. Robertson: Now, as I understand, at the outset here counsel agreed, or else I misunderstood him, that we would testify for the tax year commencing June 1, 1950, the actual, fair, cash value of Libby, McNeill & Libby's property was \$49,100 and of the Yakutat & Southern Railway was on that date \$106,200.

(Testimony of Dorothy Henry.)

Mr. Paul: Do you say, will I stipulate that we will testify to that?

Mr. Robertson: Yes. Is that what you said you would stipulate to, or not? I thought when you started out and the Judge asked you about it—if you won't——

Mr. Paul: Oh, yes. I wasn't getting at exactly that idea, but I will stipulate that is what they claim and that they claimed that when they appeared before the Board of Equalization. [64]

The Court: Is that embodied in one of your objections?

Mr. Robertson: Yes, your Honor.

The Court: What number is that?

Mr. Paul: The defense that I stated originally when we began this hearing this morning was that that amount was not supported by any evidence before the Board of Equalization and that a mere claim is not enough to exhaust the administrative remedies. That was what I started out by saying this morning. But I will stipulate that they made that claim.

Mr. Robertson: Well, we will offer evidence of it.

The Court: Well, you don't have to if he is willing to stipulate it.

Mr. Robertson: He is willing to stipulate we make that claim. I will offer evidence to that effect.

The Court: To the effect that you made such a claim?

Mr. Robertson: I was going to put witnesses on

(Testimony of Dorothy Henry.)

to testify to these values, but the Court said to start out with he was trying to shorten this, and I was wondering whether or not he would admit that, if I called witnesses, they would testify to these values. That is what I was trying to get at.

The Court: Well, I think this stipulation is about enough to cover that, isn't it? The stipulation that the claim was made that the value was so and so seems broad enough to include the testifying thereto of witnesses. But, now, that is embodied in Objection—— [65]

Mr. Robertson: That is embodied in Objection 10, your Honor, showing the value of railroad property for each of those two years, real property, which includes land and buildings, was \$99,000, and its personal property for each of those two years was \$7,200, and that Libby's personal property for 1950 was \$49,100 and Bellingham Canning Company's for 1951 was \$76,603. I don't presume a stipulation is necessary to this because they have already answered the Objectors' Request for Admissions under Rule 36. They have answered affirmatively to Request 22, 23, 24 and 25 and 26, which is where I set out the letters where we paid the checks on those two years, your Honor, and also where they accepted the checks, I mean, taken the checks and cashed them and never made any refund of any amount of it. So, I will offer those in evidence.

Mr. Paul: No objection.

The Court: They are received in evidence.

(Testimony of Dorothy Henry.)

Mr. Robertson: As I understand, Mr. Paul, since we agreed, stipulated, that the Bellingham Canning Company bought out Libby, McNeill & Libby on May 5, 1951, that it might be possibly from that inferred, implied—we definitely stipulated on June 1, 1950, the Bellingham Canning Company did not own any of the real property for the tax year 1950—they didn't acquire any ownership of any of it until May 5, 1951.

Mr. Paul: Yes; that is right.

The Court: Well, you better restate that. [66]

Mr. Robertson: Well, I asked counsel to stipulate that on June 1, 1950, the objector Bellingham Canning Company owned no personal or real property situated within the city limits of the City of Yakutat and that its interest in this property was not acquired until May 5, 1951, when it purchased Libby's interest therein.

Mr. Paul: Right. Yes.

Mr. Robertson: Will you also stipulate that the Bellingham Canning Company at the time of purchase on May 5, 1951, paid \$120,000 to Libby, McNeill & Libby for all of the physical assets within the City of Yakutat, such as land, buildings, stock, equipment, or machinery, equipment and things of that kind, from which, upon which was given a credit of \$20,000 as covering the purchase price of railroad trackage and other properties outside of the city limits and that in addition the Bellingham Canning Company paid Libby \$80,000 for inventory of stock, like merchandise and stores on hand.

(Testimony of Dorothy Henry.)

Mr. Paul: I so stipulate. Of course now we are getting into counsel's case.

The Court: I don't understand what that credit of twenty thousand was given for.

Mr. Robertson: That was put in a negative way, but the \$20,000 covered the property outside of the town, railroad tracks and things of that kind, your Honor. In other words, they actually paid one hundred and eighty thousand for what [67] was in the town, which also included the Libby stock in Yakutat & Southern Railway.

Mr. Paul: Is counsel through with the witness?

Mr. Robertson: Well, I rather think I am, your Honor, but I called her down here, and, as I go through here, I am trying to get this all in here and get this case closed up, your Honor. May I call her back, if necessary, after she steps down?

The Court: It seems to me what is going on now appears to be in support of the defense, which ordinarily wouldn't be put in until after the City rested.

Mr. Robertson: Well, we got started off on this in this manner, your Honor. I agree with you. I had anticipated I would have to call Mrs. Henry to prove some of these things.

The Court: It is all right if he is through with his case.

Mr. Robertson: I brought her down with these records, but any time anything occurred to me Mr.

(Testimony of Dorothy Henry.)

Paul seemed willing to stipulate, so I haven't asked very many questions.

The Court: It doesn't make much difference; except, are you going to rest with this witness?

Mr. Paul: I have just one or two more questions.

Redirect Examination

By Mr. Paul:

Q. Mrs. Henry, the ordinance book, you stated, is down at [68] your hotel room?

A. Right now.

Q. Do you know whether the City has adopted an ordinance with respect to posting the delinquent tax roll in place of advertising it in a newspaper?

Mr. Robertson: I think the ordinance is the best evidence, your Honor.

Mr. Paul: First, is there such an ordinance; then I will ask her to produce it.

A. I would rather not answer that question because I don't know fully all the ordinances.

Q. Well, you look over the ordinance book and see if there is anything like it and then bring it up here, will you please?

A. Do you want it right now: I can get it right now.

Q. I guess after lunch would be all right.

Mr. Paul: That is all. The applicant rests. You may step down now.

Mr. Robertson: Well, this is before the Court itself, but on my motion, your Honor, based upon

those various statements heretofore that the application be dismissed, your Honor, they have proved none of the necessary jurisdictional action required before it could be presented to the Court, that it is *res adjudicata* under the decisions of the Appellate Court in the 1948 and 1949 tax appeal case, and also that that case is [69] also the rule of law governing this case as to the delinquent tax roll.

The Court: Well, the ruling is the same, or, I mean, the ruling will be reserved on it.

Mr. Robertson: I think that is our case, your Honor. Since Mr. Paul is going to call Mrs. Henry back at 2:00 o'clock and since I have been trying to go pretty fast here, I wonder if I could just reserve my conclusion, as to whether I am through, until 2:00 o'clock and have time during the lunch hour to think it over.

The Court: Very well.

Mr. Paul: All Mrs. Henry will do is produce that ordinance if there is one.

The Court: Very well.

Mr. Robertson: I guess I will have to call probably both Mrs. Welsh and Mr. Bristol, your Honor, at least as to appearing before the Board of Equalization in the fall of 1951 and presenting their valuations at that time and that nobody asked them to be sworn or anything else. They were there and appeared personally and gave those statements.

The Court: Well, isn't that already covered by the stipulation?

Mr. Paul: We admit they appeared before the Board and they presented such evidence as they

wanted. It is true it was quite informal, but it looks all right to me. My [70] objection to that line of evidence is that there is no showing of an invasion of a substantial right that this Court can consider. That is the only jurisdiction this Court has to consider. It has got to be some special act that has been overlooked by the Board, as in the Chilkoot Case. Counsel has not yet met the issue.

The Court: That is a matter of argument.

Mr. Robertson: Then I think we are through, your Honor, but I would like to have until 2:00 to think it over, but I don't think there will be anything further as far as we are concerned.

The Court: Very well. Court is recessed until 2:00 o'clock.

Whereupon Court recessed until 2:00 o'clock p.m., reconvening as per recess, with all parties present as heretofore, and the trial proceeded as follows:

Mr. Robertson: I will take only a few minutes. Mr. Paul stipulated this morning that Mrs. Welsh and Mr. Bristol both appeared before the Board of Equalization and testified, and what I would like to also get in that stipulation, if he is agreeable to it, that none of the Board of Trustees or Board of Equalization or anyone asked them to be sworn under oath. There was no question that they were perfectly willing to have given that testimony under oath if they had been asked to. [71]

Mr. Paul: That is right. We will so stipulate.

Mr. Robertson: And that the cannery was not operated after the end of the 1948 salmon fishing season until in 1951 after Mrs. Welsh and her in-

terests had taken over the plant. In other words, it was not operating in 1949 or 1950. That was testified to, and I have got evidence also of that.

Mr. Paul: That is true, and also I think that, although counsel is going to use evidence in this other case, we should include in that that Libby intended to operate in 1950 but did not actually complete its intention of operating. I think that is in the evidence.

Mr. Robertson: I couldn't agree with that. That isn't in the testimony. They didn't have any plans to operate in 1950. They had some deal on for a while with Whizz Fish Company which was going to do something of that kind.

The Court: Is it material anyhow?

Mr. Paul: Oh, I don't think so, your Honor.

Mr. Robertson: Then, I would like to offer and get definitely in evidence, your Honor, Mr. Edward G. Johnson's Answers 1, 2, 3 and 4 to the—it is his Amended Answers of May 8, 1953, to Objectors' Interrogatories of November 21, 1952, and also his answers to—amended answer to Interrogatory No. 31, the same date—of course it was the answers—and also to Mr. Paul's—Mr. Paul, himself, personally made the first answers, and also Mr. Paul's Answers 31 and 33 to the [72] Interrogatories. Mr. Paul also personally on behalf of the City made the Answers to the Requests for Admissions, and I would like to put into that the Answers and Requests 1, 2 and 3. And I think Mr. Paul will admit this—it is in some of these answers to questions—that ordinance, that Ordinance No. 1 was in effect

throughout the tax years 1950 and 1951 and was not amended until sometime in the year 1952.

Mr. Paul: Yes, that was true, except, in so far as the posting provisions were concerned, it isn't mandatory for it to take advantage of the statute, to permit posting in certain cities where there are no newspapers, and that ordinance had been adopted prior to the time of the posting of the notice in this case.

Mr. Robertson: Could you point me out that ordinance? Your answer said it hadn't been amended, one of these answers, and I was relying on that.

Mr. Paul: Probably I had reference to the time when taxes were due to be paid. There has been a recent amendment on that. I am looking through the ordinance book now, but I don't find the official copy.

Mr. Robertson: I made this request, your Honor, for admissions, "Applicant's Ordinance No. 1 was in effect throughout tax years 1950 and 1951." That was Request for Admissions No. 21, and Mr. Paul, who made the answers on behalf of the City, answered that with the simple answer, "Yes." So, [73] I would like to offer that in evidence, your Honor.

The Court: Well, is that one of the responses that you referred to as 1, 2 and 3 a short time ago?

Mr. Robertson: No, your Honor. This is Mr. Paul's Answer No. 21 to my Request for Admissions of November 21, 1952. His Answers to Requests were made on December 22, 1952.

The Court: Then am I to understand that the

previous stipulation, the stipulation as to the preceding item, is to be expanded to include the fact that there was an ordinance adopted permitting the publication to be made by posting?

Mr. Paul: Apparently counsel doesn't agree on that point, so I omitted to have the former mayor testify as to its adoption and furnish him a copy.

Mr. Robertson: I am relying on Mr. Paul's answer.

The Court: If you have got the ordinances here, there shouldn't be any dispute over it.

Mr. Paul: No. I have to dig it out of my personal files and have the ex-mayor identify it as being approved. It is not final authority.

Mr. Robertson: I would like to have counsel's Answer 21 to my question then put in evidence. This is 21 in the Request for Admissions.

The Court: Maybe you better call your witness in rebuttal then.

Mr. Paul: Yes, indeed. [74]

Mr. Robertson: And in connection, your Honor—well, I suppose that is a question of argument. I think that is all, your Honor.

Mr. Paul: You mean you are resting, counsel?

Mr. Robertson: Yes.

J. B. MALLOTT

called as a witness on behalf of the applicant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Paul:

Q. Your name is J. B. Mallott?

A. Yes, sir.

Q. And you were formerly mayor of the City of Yakutat? A. I was.

Q. Do you ever recall any occasion when the Board of Trustees considered or adopted an ordinance to provide for the posting of notice of delinquent tax roll in lieu of publication in a newspaper?

A. Yes. I recall that I brought it to your attention that it was an expensive deal of publishing all of this in a newspaper when very few up there took the newspaper, and you drew up an ordinance which I presented to the council, and to the best of my memory it was passed.

Q. Do you recall the date? A. No. [75]

Q. Do you recall whether it was before or after August 9, 1952?

A. It was shortly after the last case in court.

Mr. Robertson: What was your answer?

A. I say it was after the last case, when all the publication and trouble, when it was brought up, the 1948-1949 case.

Mr. Paul: That is all.

Mr. Robertson: Well, your Honor, I don't think that is the best evidence in view of counsel's state-

ment that there were none, and I submit, your Honor, that the minute book, which was produced here, that is the best evidence that there is no such thing entered. In one of these answers they testified that that is the official record. I submit that is the best evidence.

Mr. Paul: I don't think that has been the ruling of the Court.

The Court: Would the ordinances be in the minute book?

Mr. Robertson: One of these witnesses, the City Clerk, said they were supposed to be complete.

Mr. Paul: There is a separate book, but we have examined it, your Honor, but we don't find several of the ordinances.

The Court: I don't think I can sustain an objection made on the fact that the ordinance isn't in a certain book. [76]

Mr. Robertson: No; but the further testimony, your Honor, his testimony is not the best evidence of an order. He doesn't know the date. I have counsel's statement, dated December 22, 1952.

The Court: It may be that it isn't the best evidence, but you didn't object to the question.

Mr. Robertson: I tried to object to it as soon as I could hear what the question was, with all these jets flying around here.

The Court: Your objection came after he had answered.

Mr. Paul: I take the position that our response to the question—was Ordinance No. 1 in existence for all this period—doesn't have anything to do

with a minor amendment made shortly before this notice with which we are concerned.

The Court: But that isn't the basis of his objection. There is no party precluded from introducing two items of evidence, one which happens to contradict the other or is inconsistent with it. That happens in nearly every case. Do counsel wish to argue the case or submit briefs?

Mr. Robertson: I would rather submit a brief, your Honor, if we could have a little time. I have one or two cases here I would like to cite, your Honor.

The Court: I think I would prefer briefs myself.

Mr. Paul: I can have mine in ten days, your Honor.

The Court: Very well. Ten days to each side, with [77] five days for a reply, if a reply is deemed necessary.

Mr. Robertson: Very well.

Thereafter on the 24th day of June, 1954, court having convened at 9:50 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

Mr. Robertson: If the Court please, in No. 6734-A, Mr. Paul served on me a few days ago some proposed findings of fact, conclusions of law, and cost bill, and I have prepared and I am submitting, your Honor, some written objections to them. I

will give Mr. Paul a copy of them. I don't know whether the Court would like to look them over or not. I don't——

The Court: Well, I suppose we ought to fix the time for hearing the objections.

Mr. Robertson: Well, I don't care particularly about making any extended argument on it, your Honor. I tried to set them out in detail, and there is some of the matters in these objections, and I don't think they have ever previously been called to your Honor's attention, but of course there wasn't time to submit them to your Honor. Now, if Mr. Paul wants time to hear my objections, that is agreeable with me.

Mr. Paul: Your Honor, as I glance over them I see [78] that they largely represent the continuity of the objections that counsel has heretofore made. I will confess there is one objection, however, and that is this business about the extra hundred dollars that appears in Objection No. 7. The figure of \$785.14 requested as an attorney's fee was based upon Rule 45 for contested liens. The extra hundred dollars, there was no authority for, as I look it over, and I am willing to retreat from that.

The Court: Then, am I to understand that the parties don't care to argue the objections?

Mr. Paul: I think in the main the Court has already decided them, your Honor.

Mr. Robertson: I don't think that is correct, your Honor, as to my Objections 4, 5, 6, 7 and 8, and I don't want Mr. Paul to have a misunderstanding about it, because in one of those I raised

the point that the City's tax ordinances don't fix any rate of interest to be allowed on delinquent taxes or the penalties, nor do the statutes themselves authorize a municipality to allow any interest upon penalty. If the ordinance provided for an interest within the limits of the law, I agree that interest could be charged upon the principal sum, but the ordinance itself, Ordinance No. 1, which is before this Court in this case, and neither Ordinances 1, 2 or 4, of which I asked the Court to take judicial notice, which are now in the Clerk's Office, provide for any interest to be paid upon [79] delinquent taxes or penalty.

And I also submit that Sections 16-1-121 through 130 do not authorize to fix any interest upon penalty but only to fix interest upon the amount of delinquent taxes.

The sixth one of course is the same, practically the same, as the Court has heretofore ruled on. It is about the application of these taxes contrary to the instructions under which they were paid.

I take the position under "7" that the law does not authorize in the matter of costs an attorney's fee, neither for \$785.14 nor \$100.00, and that that is contrary and can't be allowed in any event in the cost bill.

I also object to the witness fees and mileage of J. B. Mallott. We contend that he was a spurious, unnecessary and voluntary witness and testified to no material or other fact, except, as I recall, he came on the witness stand, and his testimony was that he thought there was another ordinance but he

didn't know when it was enacted. And I submit you can't put a party to cost just to bring in a witness to make a statement of that kind which is not material or relevant or anything else.

I submit it with that statement.

The Court: Does the applicant want to be heard on this?

Mr. Paul: Well, your Honor, just as I [80] glanced quickly at the ordinance, Section 15 does provide for interest.

The Court: Well, what are you looking at now?

Mr. Paul: This happens to be the printed copy of Ordinance No. 1, which came from the '49 Case, the same ordinance as in this case.

The Court: You say it provides for interest on penalties?

Mr. Paul: I would have to look at that and also the statute closely, your Honor, but on the question of interest, whether interest can be charged——

The Court: But interest on what?

Mr. Paul: On the taxes.

The Court: Well, he doesn't challenge that, as I understand it.

Mr. Paul: I think so. That is his Objection No. 4—"Ordinances in effect during the tax years 1950 and 1951 did not provide or fix any rate of interest to be paid upon either delinquent taxes or penalties thereon."

The Court: Well, I understood his statement that he just made as limiting that to the interest on penalties.

Mr. Paul: I didn't take it that way. He has an alternative point—No. 5.

Mr. Robertson: I said the ordinance, your Honor, doesn't fix any rate of interest upon either the tax or the penalty and that the statute does not authorize the fixing of [81] any on the penalty, and that the common council in passing its ordinance didn't fix any rate of interest to levy upon, and that ordinance is in the printed record and in one of the exhibits in this case originally at the trial, and I submit that a careful examination of that ordinance will bear out my statement.

Mr. Paul: Well, for the assistance of the Court, I think that this argument is a little more complicated than I figured, your Honor, and, if I can have until 2:00 o'clock to examine the ordinance closely and the statute, why, we can resolve it then.

The Court: Do you want to submit something at some time in the way of a memorandum, or what?

Mr. Paul: All right.

The Court: Well, how much time do you want?

Mr. Paul: Until 2:00 o'clock will be all right.

The Court: Very well.

Thereafter, and immediately following the foregoing, there was a hearing in cause No. 6581-A, at the conclusion of which the following occurred before the Court recessed:

The Court: Well, then, as I understand it, counsel submit both cases on the statements that have been made here this morning and on the motions that——

Mr. Robertson: And on my briefs, your Honor.

The Court: —have been filed, and [82] objections.

Thereafter on the 29th day of June, 1954, court having convened at 1:30 o'clock p.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

Mr. Robertson: I think Mr. Paul had set at this time the objections to the order of sale that I filed in No. 6734-A. That is the one in regard to the tax roll for 1950 and 1951, your Honor, and inasmuch as we had argument on the 24th to the former order of sale that Mr. Paul prepared, I have readopted those objections and made them applicable to this, and I have nothing to say other than I would like to again emphasize that the order of sale contains a 1%, or provides for a 1% upon the delinquent taxes over these various years which, as I contended, that the ordinance does not fix or provide, and it also allows an attorney's fee, and I simply submit those objections in No. 6734-A upon that basis, your Honor.

Thereafter, and immediately following the foregoing, proceedings were had in cause No. 6581-A, at the conclusion of which the following occurred before the Court recessed:

Mr. Paul: Is the Court at this time signing the orders of sale?

The Court: Yes. [83]

Mr. Robertson: I would like to ask, since the

Court will probably be gone before I can get it, I would like to ask Mr. Paul about a supersedeas bond; in No. 6581-A, I think a four-thousand-dollar bond would be sufficient, and in No. 6734-A, a six--thousand-dollar bond.

Mr. Paul: That is satisfactory.

Mr. Robertson: Very well.

Thereafter, on the 27th day of July, 1954, court having convened at 10:00 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors not appearing; the following proceedings were had:

Mr. Paul: Now, with respect to the two Yakutat cases, No. 6581-A and No. 6734-A, I notice Mr. Robertson's motion for a new trial in both were for 10.00 o'clock yesterday morning, but because of the absence of the Court they were not heard.

The Court: I didn't know there was anything left in those cases.

Mr. Paul: Mr. Robertson informs me that his argument will be very short. I have agreed with him on the telephone to his date of 2:00 p.m., Wednesday. Would that be satisfactory with the Court?

The Court: That is tomorrow?

Mr. Paul: Yes. [84]

The Court: Yes; that will be satisfactory.

Mr. Paul: Thank you. I will inform him.

Thereafter on the 28th day of July, 1954, court having convened at 2:00 o'clock p.m., at Juneau, Alaska; the Honorable George W. Folta, United

States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

The Clerk: The motion for new trial in the two Yakutat cases, No. 6581-A and No. 6734-A.

Mr. Robertson: Also with Mr. Paul's consent, your Honor, in No. 6581-A, the objectors have a motion to amend the minute order of June 29, 1954, so to show that the objections which were stated in their motion of June 23, 1954, to strike applicant's amended duplicate delinquent tax roll for 1949, dated June 23, 1954, were correct in fact but that the City doesn't admit either my legal conclusions in the objections or the validity of the objections, and Mr. Paul says he is agreeable to that minute order being so entered.

Mr. Paul: I am agreeable, your Honor.

The Court: Well, if you agree on it, the minute order may be amended accordingly.

Mr. Robertson: Now, your Honor, I can't see why we can't submit the motions in each of these two cases for new trial at one time. I don't see any necessity of arguing them [85] differently. I admit—I know how expensive these appeals are, and I wish I thought I had some—could persuade your Honor, that the grounds of my motions for new trial are correct, but I have nothing new to argue which I haven't heretofore submitted to your Honor, either orally or by brief, and without limiting myself in any manner I simply again state to your Honor, and

your Honor, in your very brief opinion or memorandum decision in No. 6734-A, stated that the objectors' substantial rights were not affected, and I would like to again emphasize, as I say, without limiting or releasing or discharging my other objections, but I submit, your Honor, that on a special proceedings that a taxpayer's substantial rights are injured when the statutory provisions of such statute in such special proceedings are not followed, and with that I submit the motions, your Honor.

The Court: Well, I don't know that I can tell—what statutory provision is it that you say was not complied with?

Mr. Robertson: Well, they appear in all my objections, your Honor, and Mr. Paul himself made up the supplemental—or what did he call it—the amended, supplemental, delinquent tax roll for 1950 and 1951. I claim there is no such statute at all, if my objections are correct. I contend, your Honor, it is very unfortunate that the City hasn't complied with this statute in any respect in either of these two [86] cases, and I think I have reiterated that to your Honor so many times I realize your Honor is probably sick of hearing me tell about it, and of course I go right back to the original, one of the original bases of our objections in the 1948-1949 tax proceedings, that there was never any assessment made at all, never any assessment made since 1948 of any kind, and I just simply have to stand, your Honor, on my—I just want to again emphasize that, your Honor, to show you my good faith in constantly bringing these things up before the Court.

The Court: Well, of course I can't see why you do it, because, no matter how many times you win, you are eventually going to be defeated.

Mr. Robertson: I don't think so, your Honor.

The Court: Well, you certainly are.

Mr. Robertson: I think your Honor made a serious error there, your Honor.

The Court: So far as assessments are concerned, if that is a typical objection, it seems to be fairly well settled that the City doesn't have to go through the same procedure as in the case of an initial assessment, that they can adopt the assessments made from the first year with such changes as have occurred in the town, and so, if that is illustrative of the other point, why, I can't be influenced much by that point or the other.

Now, I know there have been a lot of [87] irregularities here. There naturally would be. I never thought that Yakutat—I had grave doubts whether Yakutat could ever function as a municipality. The only reason that I allowed Yakutat to become incorporated was because of the failure of the Department of Justice to station a deputy marshal there, and they failed for ten or twelve years, and the people just appealed to me to allow them to incorporate to see if they couldn't bring about some order out of chaos there. I always was very much in doubt whether they could function as a municipality, and it seems that they are having great difficulty, if perhaps they have not failed in incorporating. But, when you have a municipality of that kind, so-organized, it is bound to follow that they are not

going to do any more than substantially comply with even what may be essential and jurisdictional. Have you anything to add?

Mr. Paul: I think your Honor has ruled on these points already. I do want to assure the Court that Yakutat is running its schools up there, paying its bills, saving the Federal Government a great deal of money in that regard, and I think they are doing a good job.

The Court: Well, Mahoney is the one responsible for cutting out the marshal in Yakutat, Hoonah and Craig, and I have had nothing but trouble since. It was a very shortsighted policy in trying to economize on law enforcement. I have no patience with it. I don't know how anything could be more [88] grievously wrong.

Mr. Paul: Yakutat has suffered in that regard. Still, the people, as far as they are concerned, have done the best they can for themselves with their own resources.

The Court: Well, in view of the fact that the motions for a new trial apparently present nothing new, they are denied.

Mr. Robertson: Your Honor, we agreed some time ago that in No. 6581-A, that the supersedeas bond could be four thousand dollars and in No. 6734-A, six thousand dollars, and that, I presume, was satisfactory both as to the supersedeas and the costs.

Mr. Paul: Yes. The supersedeas includes the costs.

The Court: Well, the record will so show.

Mr. Paul: May it please the Court, I notice in

looking over the official file, while the Court has indicated that the order of sale was signed on June 29, 1954, as a fact of the matter, the order has not actually been signed. Would your Honor please sign it now?

The Court: You mean it hasn't been signed yet?

Mr. Paul: No. At least I see a form of order of sale in there that has not been signed. Now, I might be in error but——

The Court: That is in which case?

Mr. Paul: In both cases, I think, your [89] Honor. However, I can assist the Clerk in checking up on that.

Now, we have one further matter in these cases. I have submitted to the Court, and it is in the official file, a form of order of withdrawal of documents deposited with the Clerk. These consist of all the City's official records. I should like to have that signed so that the City can have its records back for purposes of operating its business. I have informed counsel of this and delivered him a form of the order. If counsel desires to examine the records at any future date, they will be available.

The Court: Is there any objection to that?

Mr. Robertson: Just so that in the event that I think it should become necessary in any manner to have these original records in connection with the appeal that the City will send them back over to the custody of the Clerk, if I request it.

Mr. Paul: We agree.

The Court: Well, that will be a matter of record here, his promise to do that.

Mr. Robertson: Very well.

Thereafter on the 30th day of July, 1954, court having convened at 10.00 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, [90] their attorney; the following proceedings were had:

Mr. Robertson: In No. 6581-A, in the Matter of the Delinquent Tax Roll of the City of Yakutat, and also in No. 6734-A, In the Matter of the Delinquent Tax Roll of the City of Yakutat, I have served and filed notice of appeal, your Honor, and present my supersedeas, the one for four thousand dollars and the other for six thousand dollars, and I have submitted them to Mr. Paul.

Mr. Paul: We have no objection to the form of the supersedeas bonds, your Honor.

The Court: And the sufficiency?

Mr. Paul: U. S. F. & G.?

The Court: It has to be both as to the form and the sufficiency.

Mr. Paul: We agree that the U. S. F. & G. is adequate.

(End of Record.) [91]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz., In the Matter of the Delinquent Tax Roll of Real and Personal Property for the City of Yakutat, Alaska, for the Years 1950 and 1951, No. 6734-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 91, both inclusive, contain a full, true and correct transcript of all the foregoing proceedings on the dates herein mentioned in the above-entitled cause, to the best of my ability.

Witness, my signature this 2nd day of October, 1954.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Endorsed]: Filed October 2, 1954.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
EXTRACT OF PROCEEDINGS

Be It Remembered that on the 10th day of May, 1954, at 10:00 o'clock a.m., at Juneau, Alaska, the trial of the above-entitled cause came on for hearing before the Honorable George W. Folta, United States District Judge; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings, among other, were had:

DOROTHY HENRY

called as a witness on behalf of the applicant, being first duly sworn, testified as follows:

Cross-Examination

By Mr. Robertson:

Q. Mrs. Henry, did you bring, in response to my subpoena duces tecum, did you bring the official minutes of the Board of Trustees and the Board of Equalization? [1*]

A. Yes, I have them there.

Q. I want to check with a copy I made.

A. Any particular item?

Q. I want to check a minute. How long have you been in custody of this official minute book, Mrs. Henry? A. June 1, 1953.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Dorothy Henry.)

Q. During that time have you or to your knowledge has anyone made any changes or alterations in this book or in its minutes for the period commencing with the first entry on October 2, 1948, page 50, and the entries on page 204 of the book?

A. As far as I know, no one has made any entries.

Q. When did you say you took over?

A. June 1, 1953.

Q. Since June 1st? A. Yes.

Q. Since June 1, 1953, have there been any minutes entered in this book that in anywise directed or attempted to direct the application of the payments that Libby, McNeill & Libby, made on behalf of themselves?

Mr. Paul: Your Honor, I will object to that. That is entirely a matter of proceeding in court, and I have made the commitment, and it is binding. Whether the City actually goes through the formality of adopting a resolution, I think it is wholly immaterial. [2]

The Court: I don't think I got the purport of the question.

Mr. Paul: He is looking for a resolution which, you might say, is to this effect, that of the, say, \$2,400 received from Libby, McNeill & Libby or Bellingham, since the receipt it has been directed to be paid to extinguish the personal property taxes. That is what he is looking for, and I can tell him right now he isn't going to find it because the choice

(Testimony of Dorothy Henry.)

is made as a matter of court procedure. I have done it.

The Court: Then there is no use of looking for it if it isn't there, I presume.

Mr. Robertson: Is that true, Mr. Paul, both for the payment made for the use of 1950 taxes by Libby on behalf of itself and Yakutat and that the Bellingham Canning Company paid for 1951 on behalf of itself and Yakutat?

Mr. Paul: Yes; that is correct. There has been no formal resolution.

Mr. Robertson: And would you also agree that no such resolution or ordinance had been enacted prior to that time?

Mr. Paul: Yes.

Mr. Robertson: Sometime ago, about a year ago last fall, Mr. Paul got this book down for me, your Honor, and at that time I had a copy made of all of the minutes of it, from the page 50 up to and including the then last page, page 204, [3] and I have a copy of those minutes, typewritten copy, which I wonder if you would agree it could be put in evidence?

Mr. Paul: I agree.

Mr. Robertson: They are not certified by anyone except before a notary public, one of my secretaries.

The Court: If he agrees, if he has no objection to it, it wouldn't make any difference.

Mr. Paul: I think counsel gave me one once and I looked it over.

Mr. Robertson: Yes, I think I did.

(Testimony of Dorothy Henry.)

Mr. Paul: I want to preserve the point, however, that—as I recall, those excerpts were directed to show lack of appointment of an assessor, lack of qualification of an assessor that was appointed, show the receipt of a letter of claim by Libby, McNeill & Libby—I am going to preserve my point that I think that those actions do not violate any substantial right of the taxpayer, because, first, the board acted as its own assessor, which they can do; they don't have to have someone specially appointed; and, secondly, in so far as the receipt of the money upon condition, that is the old compromise idea and is not binding on the city at all.

The Court: You object then to the—to what?

Mr. Paul: To the excerpts; and they aren't going to go prove anything in the case. I admit that they are true copies. [4]

The Court: Well, but it seems to me that, if you agree, for instance, that a tax assessor was or was not appointed, that is all you need; then you don't have to have any documentary evidence of that if you can stipulate.

Mr. Robertson: I didn't hear that.

The Court: I say, if you can agree on whether an assessor was or was not appointed, then it is not necessary to introduce any records of this kind.

Mr. Robertson: I didn't know Mr. Paul would so agree. Will you agree that these minutes show that there was no assessor appointed for the tax year commencing June 1, 1951, that the board itself acted, although Ordinance No. 1 at that time had

(Testimony of Dorothy Henry.)

not been amended for the City of Yakutat, also that the same tax assessment for the tax year 1950 was simply adopted for the same tax year, the same tax valuation for the tax year 1949 was adopted pro forma for the tax year commencing June 1, 1950, and that there was no assessor appointed, at least until after the council had acted, when Mr. Williams was apparently appointed sometime late that fall.

Mr. Paul: Yes, we so stipulate, your Honor. The board acted as its own assessor.

Mr. Robertson: Both years?

Mr. Paul: Both years.

The Court: 1950 and 1951?

Mr. Paul: Yes. [5]

The Court: The years involved here?

Mr. Paul: Yes; the years involved here. That is what is reflected on Plaintiff's Exhibit No. 2.

Mr. Robertson: And that they simply used the same tax valuation for the tax year June 1, 1950, as they had used for the tax year June 1, 1949?

Mr. Paul: It was carried on, yes; the identical figures. Well, no; just a moment. Oh, '48. No; it was fixed at \$281,000 in 1949, and that was carried over in '50 and '51.

Mr. Robertson: Now, Mr. Paul, will you stipulate it is true, as the Court has ruled, that these points are not jurisdictional, but I would like to present evidence or at least make an offer of evidence, and it will be easiest and quickest if Mr. Paul will agree to it; I don't know whether he will

(Testimony of Dorothy Henry.)

or not; but there was—that the Board of Trustees of the City of Yakutat did not officially or by any recorded records of official action designate the assessor or any other official of the city to post any notice for the presentation of this particular delinquent tax roll to this Court?

Mr. Paul: Your stipulation goes to a special appointment, appointment by a special document?

Mr. Robertson: That there is no official record in your minute book of any such designation by the Board of Trustees or anyone to post, or any notice of presentation of this delinquent tax roll. [6]

Mr. Paul: The only official record will be that item which shows the adoption of Ordinance No. 1.

Mr. Robertson: What?

Mr. Paul: The only item appearing in the minute book will be the record showing the filing and approval of Ordinance No. 1, in so far as appointing anyone to post a notice.

The Court: Well, you mean there is a general provision in that ordinance?

Mr. Paul: Yes; authorizing the clerk.

Mr. Robertson: Well, Mr. Paul, this book does not, if my memory serves me right, does not show the adoption of Ordinance No. 1, but will you stipulate with me that true and correct copies of Ordinance No. 1 and No. 2, are in the printed record in the former case?

Mr. Paul: Yes.

Mr. Robertson: You agree now that is the only

(Testimony of Dorothy Henry.)

official action of designation of any assessor or anybody else to give notice of presentation of your Exhibit 1 to this Court?

Mr. Paul: Yes, in so far as these two tax years are concerned.

Mr. Robertson: In so far as what?

Mr. Paul: In so far as the present proceeding, the two tax years.

Mr. Robertson: And that you did not publish in any daily or weekly newspaper in the City of Juneau, Alaska, or [7] elsewhere, as required by Section 10 of the City's Ordinance No. 1, a notice that the Board of Trustees had fixed the rate of tax levy for either the tax years 1950 or 1951, designating the number of mills fixed on each dollar of assessed value of the property assessed, and that the taxes were then due and would be delinquent on or before the 15th day of September of either of said tax years 1950 or 1951.

Mr. Paul: That is right.

The Court: Now, you are reading from one of your objections, I presume.

Mr. Robertson: Yes, your Honor.

The Court: Just give me the number of that.

Mr. Robertson: I first read from my Objection No. 1.

The Court: I mean this last one.

Mr. Robertson: This is Objection No. 2, your Honor. And the third is that there is no official action indicated in the record book or minute book of any kind of the Board of Trustees designating

(Testimony of Dorothy Henry.)

the place where or the date when this delinquent tax roll, Exhibit 1, should be presented to this Court.

Mr. Paul: Right.

Mr. Robertson: That is No 3, your Honor. No. 4, that the City's Board of Trustees did not in any manner direct the time when said delinquent tax roll should be made up; no official tax record of that. [8]

Mr. Paul: No. That is right.

Mr. Robertson: Will you further stipulate to Objection No. 9, that neither the City's clerk nor any of its officers within ten days after posting of said notice, or at all, mailed to the Bellingham Canning Company, to whom the real property by said delinquent tax roll purportedly is assessed and whose last known and present address is and was known to said clerk and City to be Yakutat, Alaska, or to either Yakutat & Southern Railway or Libby, McNeill & Libby, although both of their last known and present addresses are and were well known to said clerk and City, or otherwise, notwithstanding neither City nor any of its officers published any notice in any newspaper whatsoever? Now, would you agree to that?

Mr. Paul: Well, your idea is that within ten days after the posting of the notice we did not mail a notice to Bellingham?

Mr. Robertson: That is right; or, if you did publish it in some other newspaper of which we have no knowledge, and it is now admitted you haven't, you didn't mail any.

(Testimony of Dorothy Henry.)

Mr. Paul: The only notification we gave was the posting of the notice, one of which was on this property involved here.

Mr. Robertson: That is the only notice you gave?

Mr. Paul: That is the only notice.

The Court: Well, then, am I to understand [9] that Objection No. 9 has been admitted?

Mr. Paul: Well, your Honor, one of the notices themselves was right on this piece of property which is the subject of taxation here.

The Court: Well, then you better restate the qualification of this objection, that the only notice was given—what?

Mr. Paul: By posting notices, one of which was on the property. There was no mailing, and there was no personal delivery, except that the notice was on the property. There was no mailing, and there was no publication in a newspaper.

The Court: But, as I understand it, there was the posting of notice on one of the properties, is that what you said, or the properties of one of the parties?

The Court: One of the notices on the property about which we are involved here.

Mr. Robertson: Pardon me just a moment.

Mr. Paul: Did you bring the ordinance book?

Mrs. Henry: No. It is over in the hotel. I didn't think you wanted it.

Mr. Robertson: In May, 1953, Edward G. Johnson in his sworn amended answers to Objectors' Interrogatories said in answer to Question 56—

(Testimony of Dorothy Henry.)

“Identify each building that is included in or intended to be covered by the words ‘frame buildings \$176,625.00’ [10] in said item mentioned in Interrogatory No. 54.” Answer: “The item ‘frame buildings \$176,625’ are those buildings appearing on the land now owned by Bellingham Canning Company. The same segregation was made as appears in the evidence in that certain cause entitled ‘In re Yakutat Delinquent Tax Roll for 1948-1949.’ ” I offer that in evidence.

Mr. Paul: O. K. No objection.

Mr. Robertson: That is Mr. Johnson’s amended sworn answer, your Honor, under date of May 8, 1953, to Objectors’ Interrogatories of November 21, 1952.

The Court: It will be admitted.

Mr. Robertson: Now, as I understand, at the outset here counsel agreed, or else I misunderstood him, that we would testify for the tax year commencing June 1, 1950, the actual, fair, cash value of Libby, McNeill & Libby’s property was \$49,100 and of the Yakutat & Southern Railway was on that date \$106,200.

Mr. Paul: Do you say, will I stipulate that we will testify to that?

Mr. Robertson: Yes. Is that what you said you would stipulate to, or not? I thought when you started out and the Judge asked you about it—if you won’t——

Mr. Paul: Oh, yes. I wasn’t getting at exactly that idea, but I will stipulate that is what they

(Testimony of Dorothy Henry.)

claim and that they claimed that when they appeared before the Board of [11] Equalization.

The Court: Is that embodied in one of your objections?

Mr. Robertson: Yes, your Honor.

The Court: What number is that?

Mr. Paul: The defense that I stated originally when we began this hearing this morning was that that amount was not supported by any evidence before the Board of Equalization and that a mere claim is not enough to exhaust the administrative remedies. That was what I started out by saying this morning. But I will stipulate that they made that claim.

Mr. Robertson: Well, we will offer evidence of it.

The Court: Well, you don't have to if he is willing to stipulate it.

Mr. Robertson: He is willing to stipulate we make that claim. I will offer evidence to that effect.

The Court: To the effect that you made such a claim?

Mr. Robertson: I was going to put witnesses on to testify to these values, but the Court said to start out with, he was trying to shorten this, and I was wondering whether or not he would admit that, if I called witnesses, they would testify to these values. That is what I was trying to get at.

The Court: Well, I think this stipulation is about enough to cover that, isn't it? The stipulation that the claim was made that the value was so and so seems broad enough to include the testifying

(Testimony of Dorothy Henry.)

thereto of witnesses. But, now, that is [12] embodied in Objection——

Mr. Robertson: That is embodied in Objection 10, your Honor, showing the value of railroad property for each of those two years, real property, which includes land and buildings, was \$99,000, and its personal property for each of those two years was \$7,200, and that Libby's personal property for 1950 was \$49,100 and Bellingham Canning Company's for 1951 was \$76,603. I don't presume a stipulation is necessary to this because they have already answered the Objectors' Request for Admissions under Rule 36. They have answered affirmatively to Requests 22, 23, 24 and 25 and 26, which is where I set out the letters where we paid the checks on those two years, your Honor, and also where they accepted the checks, I mean, taken the checks and cashed them and never made any refund of any amount of it. So, I will offer those in evidence.

Mr. Paul: No objection.

The Court: They are received in evidence.

Mr. Robertson: As I understand, Mr. Paul, since we agreed, stipulated, that the Bellingham Canning Company bought out Libby, McNeill & Libby, on May 5, 1951, that it might be possibly from that inferred, implied—we definitely stipulated on June 1, 1950, the Bellingham Canning Company did not own any of the real property for the tax year 1950—they didn't acquire any ownership of any of it until May 5, 1951.

(Testimony of Dorothy Henry.)

Mr. Paul: Yes; that is right. [13]

The Court: Well, you better restate that.

Mr. Robertson: Well, I asked counsel to stipulate that on June 1, 1950, the objector Bellingham Canning Company owned no personal or real property situated within the city limits of the City of Yakutat, and that its interest in this property was not acquired until May 5, 1951, when it purchased Libby's interest therein.

Mr. Paul: Right. Yes.

Mr. Robertson: Will you also stipulate that the Bellingham Canning Company at the time of purchase on May 5, 1951, paid \$120,000 to Libby, McNeill & Libby, for all of the physical assets within the City of Yakutat, such as land, buildings, stock, equipment, or machinery, equipment and things of that kind, from which, upon which was given a credit of \$20,000 as covering the purchase price of railroad trackage and other properties outside of the city limits and that in addition the Bellingham Canning Company paid Libby \$80,000 for inventory of stock, like merchandise and stores on hand.

Mr. Paul: I so stipulate. Of course now we are getting into counsel's case.

The Court: I don't understand what that credit of twenty thousand was given for.

Mr. Robertson: That was put in a negative way, but the \$20,000 covered the property outside of the town, railroad tracks and things of that kind, your Honor. In other words, [14] they actually paid one hundred and eighty thousand for what was in the

(Testimony of Dorothy Henry.)

town, which also included the Libby stock in Yakutat & Southern Railway.

Mr. Paul: Is counsel through with the witness?

Mr. Robertson: Well, I rather think I am, your Honor, but I called her down here, and, as I go through here, I am trying to get this all in here and get this case closed up, your Honor. May I call her back, if necessary, after she steps down?

The Court: It seems to me what is going on now appears to be in support of the defense, which ordinarily wouldn't be put in until after the City rested.

Mr. Robertson: Well, we got started off on this in this manner, your Honor. I agree with you. I had anticipated I would have to call Mrs. Henry to prove some of these things.

The Court: It is all right if he is through with his case.

Mr. Robertson: I brought her down with these records, but any time anything occurred to me, Mr. Paul seemed willing to stipulate, so I haven't asked very many questions.

The Court: It doesn't make much difference; except, are you going to rest with this witness?

Mr. Paul: I have just one or two more [15] questions.

Redirect Examination

By Mr. Paul:

Q. Mrs. Henry, the ordinance book, you stated, is down at your hotel room? A. Right now.

(Testimony of Dorothy Henry.)

Q. Do you know whether the City has adopted an ordinance with respect to posting the delinquent tax roll in place of advertising it in a newspaper?

Mr. Robertson: I think the ordinance is the best evidence, your Honor.

Mr. Paul: First, is there such an ordinance; then I will ask her to produce it.

A. I would rather not answer that question, because I don't know fully all the ordinances.

Q. Well, you look over the ordinance book and see if there is anything like it and then bring it up here, will you please?

A. Do you want it right now? I can get it right now.

Q. I guess after lunch would be all right.

Mr. Paul: That is all. The applicant rests. You may step down now.

• Mr. Robertson: Well, this is before the Court itself, but on my motion, your Honor, based upon those various statements heretofore that the application be dismissed, your Honor, they have proved none of the necessary jurisdictional [16] action required before it could be presented to the Court, that it is *res adjudicata* under the decisions of the Appellate Court in the 1948 and 1949 tax appeal case, and also that that case is also the rule of law governing this case as to the delinquent tax roll.

The Court: Well, the ruling is the same, or, I mean, the ruling will be reserved on it.

Mr. Robertson: I think that is our case, your

Honor. Since Mr. Paul is going to call Mrs. Henry back at 2:00 o'clock and since I have been trying to go pretty fast here, I wonder if I could just reserve my conclusion, as to whether I am through, until 2:00 o'clock and have time during the lunch hour to think it over.

The Court: Very well.

Mr. Paul: All Mrs. Henry will do is produce that ordinance if there is one.

The Court: Very well.

Mr. Robertson: I guess I will have to call probably both Mrs. Welsh and Mr. Bristol, your Honor, at least as to appearing before the Board of Equalization in the fall of 1951, and presenting their valuations at that time and that nobody asked them to be sworn or anything else. They were there and appeared personally and gave those statements.

The Court: Well, isn't that already covered by the stipulation? [17]

Mr. Paul: We admit they appeared before the Board and they presented such evidence as they wanted. It is true it was quite informal, but it looks all right to me. My objection to that line of evidence is that there is no showing of an invasion of a substantial right that this Court can consider. That is the only jurisdiction this Court has to consider. It has got to be some special act that has been overlooked by the Board, as in the Chilkoot Case. Counsel has not yet met the issue.

The Court: That is a matter of argument.

Mr. Robertson: Then I think we are through, your Honor, but I would like to have until 2:00 to think it over, but I don't think there will be anything further as far as we are concerned.

The Court: Very well. Court is recessed until 2:00 o'clock.

Whereupon Court recessed until 2:00 o'clock, p.m., reconvening as per recess, with all parties present as heretofore, and the trial proceeded as follows:

Mr. Robertson: I will take only a few minutes. Mr. Paul stipulated this morning that Mrs. Welsh and Mr. Bristol both appeared before the Board of Equalization and testified, and what I would like to also get in that stipulation, if he is agreeable to it, that none of the Board of Trustees or Board of Equalization or anyone asked them to be sworn under [18] oath. There was no question that they were perfectly willing to have given that testimony under oath if they had been asked to.

Mr. Paul: That is right. We will so stipulate.

Mr. Robertson: And that the cannery was not operated after the end of the 1948 salmon fishing season until in 1951 after Mrs. Welsh and her interests had taken over the plant. In other words, it was not operating in 1949 or 1950. That was testified to, and I have got evidence also of that.

Mr. Paul: That is true, and also I think that, although counsel is going to use evidence in this other case, we should include in that that Libby intended to operate in 1950 but did not actually complete its intention of operating. I think that is in the evidence.

Mr. Robertson: I couldn't agree with that. That isn't in the testimony. They didn't have any plans to operate in 1950. They had some deal on for a

while with Whizz Fish Company, which was going to do something of that kind.

The Court: Is it material anyhow?

Mr. Paul: Oh, I don't think so, your Honor.

Mr. Robertson: Then, I would like to offer and get definitely in evidence, your Honor, Mr. Edward G. Johnson's Answers 1, 2, 3 and 4 to the—it is his Amended Answers of May 8, 1953, to Objectors' Interrogatories of November 21, 1952, and also his answers to—amended answer to Interrogatory [19] No. 31, the same date—of course it was the answers—and also to Mr. Paul's—Mr. Paul, himself, personally made the first answers, and also Mr. Paul's Answers 31 and 33 to the Interrogatories. Mr. Paul also personally on behalf of the City made the Answers to the Requests for Admissions, and I would like to put into that the Answers and Requests 1, 2 and 3. And I think Mr. Paul will admit this—it is in some of these answers to questions—that ordinance, that Ordinance No. 1 was in effect throughout the tax years 1950 and 1951 and was not amended until sometime in the year 1952.

Mr. Paul: Yes, that was true, except, in so far as the posting provisions were concerned, it isn't mandatory for it to take advantage of the statute, to permit posting in certain cities where there are no newspapers, and that ordinance had been adopted prior to the time of the posting of the notice in this case.

Mr. Robertson: Could you point me out that ordinance? Your answer said it hadn't been

amended, one of these answers, and I was relying on that.

Mr. Paul: Probably I had reference to the time when taxes were due to be paid. There has been a recent amendment on that. I am looking through the ordinance book now, but I don't find the official copy.

Mr. Robertson: I made this request, your Honor, for admissions, "Applicant's Ordinance No. 1 was in effect throughout tax years 1950 and 1951." That was Request for Admissions [20] No. 21, and Mr. Paul, who made the answers on behalf of the City, answered that with the simple answer, "Yes." So, I would like to offer that in evidence, your Honor.

The Court: Well, is that one of the responses that you referred to as 1, 2 and 3 a short time ago?

Mr. Robertson: No, your Honor. This is Mr. Paul's Answer No. 21 to my Request for Admissions of November 21, 1952. His Answers to Requests were made on December 22, 1952.

The Court: Then am I to understand that the previous stipulation, the stipulation as to the preceding item, is to be expanded to include the fact that there was an ordinance adopted permitting the publication to be made by posting?

Mr. Paul: Apparently counsel doesn't agree on that point, so I omitted to have the former mayor testify as to its adoption and furnish him a copy.

Mr. Robertson: I am relying on Mr. Paul's answer.

The Court: If you have got the ordinances here, there shouldn't be any dispute over it.

Mr. Paul: No. I have to dig it out of my personal files and have the ex-mayor identify it as being approved. It is not final authority.

Mr. Robertson: I would like to have counsel's Answer 21 to my question then put in evidence. This is 21 in the Request for Admissions.

The Court: Maybe you better call your witness in [21] rebuttal then.

Mr. Paul: Yes, indeed.

Mr. Robertson: And in connection, your Honor—well, I suppose that is a question of argument. I think that is all, your Honor.

Mr. Paul: You mean you are resting, counsel?

Mr. Robertson: Yes.

J. B. MALLOTT

called as a witness on behalf of the applicant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Paul:

Q. Your name is J. B. Mallott?

A. Yes, sir.

Q. And you were formerly mayor of the City of Yakutat? A. I was.

Q. Do you ever recall any occasion when the Board of Trustees considered or adopted an ordinance to provide for the posting of notice of delinquent tax roll in lieu of publication in a newspaper?

A. Yes. I recall that I brought it to your attention that it was an expensive deal of publishing all of this in a newspaper when very few up there took the newspaper, and you drew up an ordinance which

(Testimony of J. B. Mallott.)

I presented to the council, and to the best of my memory it was passed. [22]

Q. Do you recall the date? A. No.

Q. Do you recall whather it was before or after August 9, 1952?

A. It was shortly after the last case in court.

Mr. Robertson: What was your answer?

A. I say it was after the last case, when all the publication and trouble, when it was brought up, the 1948-1949 case.

Mr. Paul: That is all.

Mr. Robertson: Well, your Honor, I don't think that is the best evidence in view of counsel's statement that there were none, and I submit, your Honor, that the minute book, which was produced here, that is the best evidence that there is no such thing entered. In one of these answers they testified that that is the official record. I submit that is the best evidence.

Mr. Paul: I don't think that has been the ruling of the Court.

The Court: Would the ordinances be in the minute book?

Mr. Robertson: One of these witnesses, the City Clerk, said they were supposed to be complete.

Mr. Paul: There is a separate book, but we have examined it, your Honor, but we don't find several of the ordinances. [23]

The Court: I don't think I can sustain an objection made on the fact that the ordinance isn't in a certain book.

Mr. Robertson: No; but the further testimony, your Honor, his testimony is not the best evidence of an order. He doesn't know the date. I have counsel's statement, dated December 22, 1952.

The Court: It may be that it isn't the best evidence, but you didn't object to the question.

Mr. Robertson: I tried to object to it as soon as I could hear what the question was, with all these jets flying around here.

The Court: Your objection came after he had answered.

Mr. Paul: I take the position that our response to the question—was Ordinance No. 1, in existence for all this period—doesn't have anything to do with a minor amendment made shortly before this notice with which we are concerned.

The Court: But that isn't the basis of his objection. There is no party precluded from introducing two items of evidence, one which happens to contradict the other or is inconsistent with it. That happens in nearly every case.

(End of this record.) [24]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, No. 6734-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 24, both inclusive, contain a full, true and correct transcript of all the above extract of proceedings at the trial of the above-entitled cause, to the best of my ability.

Witness, my signature this 28th day of May, 1954.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Endorsed]: Filed June 8, 1954.

[Title of District Court and Cause.]

DOCKET ENTRIES IN No. 6734-A

Oct. 15, 1952—Application filed.

Sept. 9, 1952—Objections of Yakutat & Southern Railway, Libby, McNeill & Libby & Bellingham Canning Co.

Nov. 6, 1952—Notice of taking of Depositions under Rule 30, filed.

Nov. 7, 1952—M/O Court signed Order for Sale of Real property and allowed \$250 atty. fee—above order filed and entered.

Nov. 10, 1952—Cost Bill filed.

Nov. 21, 1952—Interrog. propounded by Objectors to applicant under Rule 33 filed.

Nov. 21, 1952—Objectors Request under Rule 36 for Admissions by applicant filed.

Nov. 28, 1952—Objectors Petition filed.

Dec. 2, 1952—Notice of taking Deposition filed.

Dec. 2, 1952—Direct Interrog. propounded by objectors to Harold G. Heaton filed.

Dec. 2, 1952—Motion Objectors for Production of Documents etc. filed.

Dec. 17, 1952—Dep. of Harold G. Heaton filed.

Dec. 17, 1952—Objectors notice of filing of H. G. Heaton's deposition filed.

Dec. 19, 1952—Motion for Extension of Time (Pltfs).

Dec. 19, 1952—M/O Court granted Objectors Motion for production of Documents.

Dec. 22, 1952—Applicant's Answer to Obj. Interrog. of 11/21/52 filed.

Dec. 22, 1952—Applicant's Answer to Request for Admission filed.

Dec. 24, 1952—Objectors Motion to Strike filed.

Dec. 29, 1952—M/O Hearing on Objectors Motion for entry of Judg., etc., see minute order 12/29/52.

Jan. 7, 1953—M/O Objectors Motion to suppress applicants ans. to objectors Interrog. filed.

March 27, 1953—M/O Court sustained Objectors Motion to suppress Applicants Ans., etc., except as to Ans. No. 4. Respondent granted 2 weeks to respond.

May 11, 1953—Applicant's amended Ans. to Objectors Interrog. of 11/21/52 filed.

March 4, 1954—Pltf's. motion for trial filed.

April 23, 1954—M/O Court set hearing for April 28th.

April 26, 1954—Affidavit on Motion for Summary Judgment & Judgment on pleadings filed.

April 28, 1954—After hearing on motions for Summary Judgment and to set for trial—matters taken under advisement.

April 30, 1954—M/O After hearing arguments on motions court ruled said motions for Judgment would be denied.

May 5, 1954—Subpoena Duces Tecum issued.

May 8, 1954—Marshal's Return on above filed (5-6-54).

May 8, 1954—Subpoena Duces Tecum issued for Dorothy Henry.

May 10, 1954—M/O Case on trial. Briefs to be filed. Each side to have 10 days and a further 5 days for Reply Brief if found necessary.

May 12, 1954—Applicants Brief Filed.

May 26, 1954—Objectors Brief filed.

May 27, 1954—Objectors Supplemental Brief filed.

June 1, 1954—Applicants Reply Brief filed.

June 8, 1954—Reporter's Transcript of Extract of Proceedings filed.

June 8, 1954—Case file sent to Judge at Anchorage.

June 16, 1954—M/O Memorandum Opinion signed and filed.

June 18, 1954—Cost bill filed.

June 24, 1954—Objections to Findings of Fact, Conclusions of Law, Order of Sale and Cost bill filed.

June 24, 1954—M/O Case came on for hearing—Objectors filed Objections to Findings of Fact, Conclusions of Law, Order of Sale and Cost Bill.

June 24, 1954—Court granted pltf. until 2 p.m. to submit authorities on objections.

June 25, 1954—M/O Court ruled that the objections of the taxpayers to the allowance of interest and penalties and of a fee to the City Clerk are sustained and all other objections are overruled.

June 28, 1954—Objectors objections to Order of Sale filed.

June 29, 1954—M/O Hearing on Objections to order of sale—following which court signed Order of Sale—stipulated that amount of supersedeas Bond be \$6,000.00.

June 29, 1954—Order filed and entered.

July 2, 1954—Motion for New Trial filed.

July 6, 1954—Affidavit of service by mail filed.

July 13, 1954—Applicants Notice of Attys Claim of lien filed.

July 21, 1954—Notice of hearing by applicant on objectors motion for new trial filed.

July 27, 1954—M/O Hearing on Motion for new trial—case set for 2 p.m., Wednesday, July 28th.

July 28, 1954—M/O Objectors Motion to amend M/O of 6/30/54 after argument court denied motion for new trial.

July 30, 1954—Notice of Appeal to the U. S. Court of Appeals for the 9th Circuit under Rule 73 (b) filed.

July 30, 1954—Supersedeas on Appeal filed.

July 30, 1954—M/O Court approved & Appeal

allowed & Order of Sale stayed this 30th day of July. Order filed and entered.

Sept. 3, 1954—Order extending time to Docket Appeal filed.

Aug. 31, 1954—Court signed Order extending time for filing appeal until Oct. 10, 1954.

Aug. 31, 1954—Order extending time to file and docket appeal filed and entered Oct. 2, 1954. Reporter's Transcript filed.

Oct. 4, 1954—Praecipe for Appeal Record filed.

Oct. 6, 1954—Motion for Order extending time to file and docket Appeal filed.

Oct. 6, 1954—M/O Upon consideration of above the Court signed Order extending time to file and Docket Appeal.

Oct. 6, 1954—Order above filed and entered.

[Title of District Court and Cause.]

United States of America,
Territory of Alaska,
Division Number One—ss

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court

to be affixed at Juneau, Alaska, this 21st day of October, 1954.

J. W. LEIVERS,

Clerk of the District Court.

By /s/ P. D. E. McIVER,

Chief Deputy Clerk of Court.

[Endorsed]: No. 14561. United States Court of Appeals for the Ninth Circuit. Yakutat & Southern Railway, a Corporation; Libby, McNeill & Libby, a Corporation, and Bellingham Canning Company, a Corporation, Appellants, vs. The City of Yakutat, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed October 25, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit.

No. 14561

YAKUTAT & SOUTHERN RAILWAY; LIBBY,
McNEILL & LIBBY, and BELLINGHAM
CANNING COMPANY, Each a Corporation,

Appellants,

vs.

CITY OF YAKUTAT, ALASKA,

Appellee.

APPELLANTS' STATEMENT OF POINTS

1. The rule of law laid down by this Honorable Court in its Cause No. 13455, Libby, McNeill & Libby, a corporation, and Yakutat & Southern Railway, a corporation, Appellants, versus City of Yakutat, Alaska, Appellee, announced in its written Opinion of July 17, 1953 (reported, 206 F.2d 612), which Opinion and this Honorable Court's Mandate, issued in accordance therewith on August 19, 1953, are res judicata herein and the law of this cause.

2. The preponderance of the evidence proved that Appellants' properties were over-valued and over-assessed for each of the tax years 1950 and 1951 and were of the true and full value during those two years as claimed by Appellants, and for neither of those years were the taxes on Appellants' properties fairly assessed or equalized.

3. Appellee did not prove, nor did the trial Court require Appellee to prove, that it had done any of the jurisdictional acts required in these special proceedings by Sections 16-1-121 through 16-1-126, ACLA 1949, in that Appellee's trustees did not officially designate the city assessor or other official to give the notice required by Section 16-1-122, officially direct either the publishing or posting of that notice, officially designate the place where or the date when the application would be made, or officially designate the dates and period either of publishing or posting that notice.

4. No assessment was made for either the tax years 1950 or 1951 by the city assessor, or otherwise, although the Municipal Ordinances then in effect required the assessment to be made by the city assessor, and the trustees, if they did anything, simply unofficially adopted the valuation in substantial effect that had been used during the tax year 1949 during and for which year the city assessor had made no assessment, and for which tax year of 1949 the trial court in effect had unlawfully appointed and constituted itself assessor and assessed Appellants' properties at \$283,630.00.

5. The taxes were assessed against the Bellingham Canning Company for the tax years 1950 and 1951, although it owned none of the property until May 5, 1951, and then none of the realty but only the personalty.

6. No taxes were duly levied for either tax year 1950 or 1951.

7. No taxes were assessed against either Libby, McNeill & Libby or the Yakutat & Southern Railway for the tax years 1950 and 1951, although the former owned the personalty until May 5, 1951, and the latter during both years owned the realty as Appellee at all times knew.

8. Notice of presentation of the duplicate delinquent tax roll was neither published nor posted as required by either the law or the municipal ordinances.

9. The judgment allowed interest upon penalty, notwithstanding the municipal ordinances did not require or provide for the payment of interest upon penalty.

10. The duplicate delinquent tax roll, Exhibit 1, did not segregate taxes upon personalty from those upon realty or segregate the ownership of either personalty or realty, and affords no means of computing taxes upon the two classes of property or as to the three different ownerships.

11. Aliunde evidence was admitted, i.e.: Dorothy Henry's deposition and page 5 of purported assessment book, Exhibit 2, to modify, amend, and alter the duplicate delinquent tax roll, Exhibit 1.

12. Computation of segregated taxes upon personalty and realty was based upon aliunde evidence, i.e.: Dorothy Henry's deposition and page 5 of purported assessment book, Exhibit 2, not upon the duplicate delinquent tax roll, Exhibit 1.

13. The judgment allowed an attorney's fee contrary to law.

14. Payments made by the respective Appellants in full of their respective taxes at the true and full value thereof, which payments were received, retained, and not returned by Appellee, were applied contrary to Appellants' instructions which accompanied the payments in such manner as to satisfy the personal property taxes at Appellee's claimed valuations and to leave unsatisfied the real property taxes at Appellee's claimed valuations.

Dated at Juneau, Alaska, October 22, 1954.

/s/ R. E. ROBERTSON,
Of Attorneys for Appellants.

Affidavit of mail attached.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellants hereby designate, for inclusion in the record on appeal, the District Court's complete record, including all docket entries and all the proceedings and evidence, including all exhibits, in this action, including the Court Reporter's complete transcript of record, but omitting therefrom Subpoena duces tecum, with service return, to Dorothy Henry; Applicant's Brief (filed May .., 1954);

Amendment to Applicant's Brief; Applicant's Reply Brief; Objectors' Brief and Supplemental Brief; Notice of Attorney's Lien, dated July 13, 1954; Applicant's Memo and Praecipe in District Court for Appeal Record, and without duplication of Reporter's transcript of May 10, 1954, but including, if it is necessary to be printed in the Printed Appeal Record in this cause in order to be considered herein, Excerpt from Objectors' Brief, pages 32 and 33, also Affidavits of Humphrey and Humphrey and Fleming, pages 34 to 37, also the Reporter's Transcript, pages 60 to 79, also Municipal Ordinances 1, 2, and 8, Exhibits A, B and C, pages 85 to 105, Interrogatories to and Answers, Amended and Further answers of Defendants, Defendants' Requests for Admission and Plaintiff's Objections thereto, pages 113 to 157, the Trial Proceedings, pages 173 to 319, of the printed record heretofore submitted to this Honorable Court in its cause No. 13,455, because the trial Court by its order of June 29, 1954, stated that all of the evidence in its cause No. 6581-A (Appellate Court Cause No. 13,455) would be considered in the trial Court's cause No. 6734-A. which is this cause.

Dated at Juneau, Alaska, October 22, 1954.

/s/ R. E. ROBERTSON,

Of Attorneys for Appellants.

Affidavit of Mail Attached.

[Endorsed]: Filed October 25, 1954.

No. 14,561

IN THE

United States Court of Appeals

For the Ninth Circuit

YAKUTAT & SOUTHERN RAILWAY, a corporation;
LIBBY, McNEILL & LIBBY, a corporation;
and BELLINGHAM CANNING COMPANY, a corporation,

Appellants,

VS.

THE CITY OF YAKUTAT,

Appellee.

BRIEF FOR APPELLANTS.

R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
P. O. Box 1211, Juneau, Alaska,
Attorneys for Appellants.

FILED
MAR 16 1955

PAUL P. O'BRIEN, CLERK

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NB: For the Court's convenience and inasmuch as the trial Court said it would consider all the evidence before it in Case No. 13,455 (Volume 1 PR herein; lower Court No. 6581-A), Appellants here reprint their Subject Index in their main brief in Case No. 13,455.

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NB: For the Court's convenience, Appellants here relist the authorities cited in and the page references thereto in their Brief in Case No. 13,455.

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No. 14,561

IN THE

**United States Court of Appeals
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YAKUTAT & SOUTHERN RAILWAY, a corporation;
LIBBY, McNEILL & LIBBY, a corporation;
and BELLINGHAM CANNING COMPANY, a corporation,

Appellants,

VS.

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Appellee.

BRIEF FOR APPELLANTS.

Inasmuch as the Clerk on January 27, 1955, informed Appellants that the Court had granted their petition to use and adopt herein their brief in Case No. 13,455, wherein Yakutat & Southern Railway and Libby, McNeill & Libby, but not the Bellingham Canning Company, were appellants and The City of Yakutat was appellee, and wherein the validity of Appellee's assessment and levy of taxes upon the same realty but for the year 1949 (the trial Court having found for Appellants as to the year 1948), instead of the years 1950 and 1951, were challenged, they hereby

do so as a supplement or appendix on such legal points as are in common, and, to save space, will refer thereto as Bf. 13,455, p. so and so.

STATEMENT OF PLEADINGS AND FACTS.

A. Jurisdictional Statutes.

See: Bf. 13,455, pp. 1-22.

B. Pleadings.

The corporations Yakutat & Southern Railway, Libby, McNeill & Libby, and Bellingham Canning Company were the Objectors, but herein are designated as Appellants.

The second class Alaskan municipality, the City of Yakutat, Alaska, was the applicant in this proceeding, but herein is designated as Appellee. Throughout it has been represented by learned practicing attorneys, Wm. L. Paul, Jr., of Juneau and Seattle, and Fred Paul of Seattle.

Proceedings.

This is a purported statutory tax lien foreclosure proceeding under Sections 16-1-121 through 16-1-131, ACLA 1949 (Bf. 13,455, pp. 6-18), instituted in the District Court for the Territory of Alaska at Juneau by Appellee for an order of sale of property, both realty and personalty, situated in the Appellee municipality, to enforce payment of alleged and delinquent municipal taxes, without segregation of the taxes themselves as to realty and personalty, and pur-

portedly entirely against Appellant Bellingham Canning Company alone (PR 16), hereinafter termed "Bellingham", although Appellant Yakutat & Southern Railway, hereinafter termed "Railway", is now and at all times has been the sole owner of the realty, and the Railway and Appellant Libby, McNeill & Libby, hereinafter termed "Libby", were the several but not joint owners during the tax year 1950 of personalty situated within Appellee, and the Railway and Bellingham were the several but not joint owners during the tax year 1951 of personalty situated within Appellee.

Objections.

Appellants' counsel having learned that Appellee intended to present at an unknown hour on September 9, 1952, a purportedly delinquent tax roll for 1950 and 1951, and no delinquent tax roll or application for judgment and order of sale having been filed, and the statute making no specific provision for filing objections in advance, (Appellants' attorney's letter of September 8, 1952, to Judge Folta, PR 13-14), Appellants filed with the Clerk of the District Court on September 8, 1952, their Objections (PR 3-13), a copy whereof they served upon Appellee's attorney. Epitomized therein they set out (PR 4) a copy of the purported Delinquent Tax Roll which was subsequently filed, and specified Appellee's statutory and ordained delinquencies (PR 5-10), including non-appointment of an assessor and lack of assessment, and non-segregation of realty and personalty property taxes and of the several individual ownerships

of the property (PR 6-7); purported assessment against Bellingham alone although Appellee knew Railway owned all the realty and part of the personalty, and that Libby owned part of the personalty to May 2, 1951, and that Bellingham owned part of the personalty since May 2, 1951 (PR 7-8); that the purported assessment was no more than adoption of 1948 assessment and was not based upon any evidence (PR 9-10); that the purported assessments were made in bad faith and not based upon evidence and are excessive and fraudulent (PR 10-11), and that each Appellant had paid its respective taxes at their true and full respective values (PR 11-12).

Appellee admitted (PR 198-200) Objections 1, 2, 3, 4 and 9 (PR 5-6; 8), except it qualified its admission of Objection 9 by claiming it had posted the notices, one on the property involved (PR 200). The last paragraph of Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 9), provides:

“When the delinquent tax roll is not published in a newspaper but notice thereof is given by posting as above provided, the clerk of the municipality shall within ten days after such posting mail to each person to whom a tract is assessed, at his last known address, a notice describing the tract, the amount due as stated on the delinquent tax roll, and giving the time and place when and where judgment and order of sale will be applied for.”

Before the Order of Sale was entered on June 29, 1954 (PR 128-129), Appellants served and filed Objections (PR 120-123) on June 24, 1954, supple-

mented by their further Objections of same date (PR 124-125), which were overruled on June 29, 1954 (PR 219, also 125).

Application.

On October 15, 1952, Appellee filed its Application, wherein it stated that "notice of this application for order of sale was duly posted" (PR 15), together with "Notice of Delinquent Taxes Real Property" wherein is set forth a copy of the purported Delinquent Tax Roll (PR 16), which differs in form from that before this Honorable Court in Case No. 13,455 (PR 10, 13 therein; also PR 10, 13 in Case No. 14,-562) and which its Opinion of July 8, 1953 (206 F2d 612), held invalid, only in that it says: "Lot, Block and Description and to Whom Assessed if Known: Bellingham Can Co. Land \$11,000; frame bldgs., \$176,625; Personal, \$94,000" (PR 16), whereas in Cases 13,455 and 14,562 (PR 10, 13), it says: "Lot, Block and Description and to whom assessed: Libby, McNeill & Libby and Yakutat & Southern Railway U.S. Survey Alaska No. 2881 together with personal property thereon located".

The tax for each year is lumped; the penalty is lumped for the two years; and the interest is lumped for the two years. The notice admittedly (PR 234) did not contain the millage rate as prescribed by Sections 9 and 10. Appellee's Ordinance No. 1. (Appendix, pp. viii, ix infra.) That Ordinance was before this court in Case 13,455 (Bf. p. 72) and is now before this Court in Case 14,562 (PR 85-102).

The application is also accompanied by the City Clerk's certificate (PR 17-18) dated August 9, 1952, which intimates that the notice was published (8th line from bottom PR 17) although the application said it was posted (PR 15), and it was admittedly not published (PR 234).

Further Proceedings.

Under Rule 36, FRCP, Appellants on November 21, 1952, requested Admissions from Appellee (PR 27-46), which Appellee answered (PR 88-90) on December 22, 1952, some three weeks late under Rule 36, *ibid*.

Under Rule 33, *ibid*, Appellants on November 21, 1952 (PR 46-64), propounded Interrogatories to Appellee. Appellee having made no objections within 10 days or served within 15 days its Answers, Appellants on December 12, 1952, moved (PR 85) for entry of judgment by default under Rule 37(d), *ibid*.

Thereafter on December 22, 1952 (PR 90-96), Appellee evasively answered, having in the meantime filed its unverified Motion for Extension of Time (PR 87) to answer Appellants' Requests and Interrogatories, which Motion was served on December 19, 1952, some 19 days after the 10 days time allowed by Rule 36(a), *ibid*, had expired for Appellee to respond or object to Appellants' Requests (PR 27-46) and some 13 days after the 15 days time allowed by Rule 33, *ibid*, had expired for Appellee to answer Appellants' Interrogatories (PR 46-64).

Appellants on December 23, 1952 (PR 96-98), moved to strike Appellee's Motion for Extension of

Time (PR 87), because no notice thereof was given as required by Rules 33 and 36(a), *ibid*; and to strike Appellee's Answers (PR 90-96) to their Requests (PR 27-46) because those Answers were not sworn to or timely filed as required by Rule 36(a), *ibid*, and were tardily filed without the Court's permission, and also to strike Answers 23, 24, 25 and 26 because unintelligible and Answers 1, 12, 13, 14 and 15 because neither immateriality nor ignorance was a sufficient objection or response to a Request; and to strike Appellee's Answers (PR 90-96) to Appellant's Interrogatories (PR 46-64), because those Answers were not sworn to under oath by an official of Appellee as required by Rule 33, *ibid*, and were tardily filed (some 13 days too late) on December 22, 1952, without permission of the Court having been granted to do so, in utter disregard of Rule 33, *ibid*, and after Appellants had served their Motion (PR 85) for entry of Judgment by Default under Rule 37(d), *ibid*, and while that motion was still pending and without any relief having been granted to Appellee under Rule 60(b), *ibid*.

On December 29, 1952 (PR 22-23; 99), notwithstanding Appellee's clear violation and disregard of Rules 33 and 36, *ibid*, the Court denied Appellants' Motion for Default (PR 85) and Motion to Strike (PR 96-98) and allowed Appellee's Motion for Extension of Time (PR 87).

On January 7, 1953, Appellants moved (PR 99-102) to Suppress Appellee's Answers (PR 90-96) to their Interrogatories (PR 46-64), which Motion was granted (PR 102) on March 27, 1953, and Appellee given

two weeks within which to respond, but Appellee did not serve its Amended Answers until May 8, 1953 (PR 103-111), two days prior to the trial on May 10, 1954 (PR 24, 115).

On April 17, 1954, Appellants moved (PR 112-113) for Summary Judgment under Rule 56, *ibid*, and for Judgment on the Pleadings under Rule 12, *ibid*, which Motion was denied on April 30, 1954 (PR 23-24; 115).

Trial was had on May 10, 1954 (PR 24, 115-117, 170-249) over Appellants' objection (PR 174), *inter alia*, that this Honorable Court's Opinion of July 8, 1953 (206 F2d 612), in its Case #13,455 was the rule of, governed, and was *res judicata* in this proceeding.

The case was submitted on briefs (PR 24, 115, 252).

The trial Court rendered its Memorandum Decision (PR 118) on June 16, 1954 (PR 25, 117), wherein it said that Appellants' objections were either lacking in merit or else did not affect their substantial rights. The trial Court thereby ignored Appellee's nonperformance of statutory and municipal requirements in this special proceeding and disregarded this Honorable Court's Opinion of July 8, 1953 (206 F2d 612) in its Case No. 13,455.

Appellee having served Appellants with proposed findings of fact, conclusions of law, cost bill (PR 119-120), and order of sale (PR 128-129), although not ever filing its proposed findings and conclusions, Appellants served and filed their Objections thereto (PR 120-121, 124-125).

On June 25, 1954 (PR 24-25, 124), the trial Court overruled Appellants' Objections except it allowed their objection to interest on penalties and a fee to the City Clerk of \$100 (PR 119).

On June 29, 1954 (PR 128-129), the Order of Sale was entered holding delinquent realty taxes for 1950 of \$2,033.20, plus 12% penalty thereon of \$243.98, plus 1% interest monthly on the tax from December 15, 1950, of \$874.28, and for 1951 of \$1631.25, plus 12% penalty thereon of \$195.75, plus 1% interest monthly on the tax from December 15, 1951, of \$489.41, notwithstanding Sec. 12, Municipal Ordinance (Appendix, pp. ix-x *infra*), does not impose or fix any specific rate of interest on delinquent taxes.

On June 29, 1954 (PR 125), before signing the Order of Sale in this case and in Case No. 14,562, the Court ordered that the evidence introduced in support of Appellants' objections (PR 125) to the Tax Roll in Case No. 14,562 would be considered in this case (Trial Court No. 6734-A).

Appellants' Motion for New Trial (PR 134-136), filed July 2, 1954, was denied July 28, 1954 (PR 126), notwithstanding the trial Court said: "Now, I know there have been a lot of irregularities" (PR 223).

Appellants served and filed their Notice of Appeal on July 30, 1954 (PR 138), and on the same day filed their Supersedeas on Appeal which the trial Court approved, allowed the appeal and stayed the Order of Sale (PR 129-133).

Appellants docketed their appeal on October 25, 1954 (PR 259), the time having been extended to

October 28, 1954, by trial Court Orders of August 31, 1954 (PR 139), and of October 6, 1954 (PR 141-142), because of absence of the Official Court Reporter and her pressure of work.

Appellants filed their Statement of Points (PR 256-259) and Designation of Contents of Record on Appeal (PR 259-260) on October 25, 1954.

Payment of Taxes.

Taxes for 1950 of \$1699.20 at 16 mills on Appellant Railway's realty at its true and full value of \$99,000 and personalty \$7,200 and taxes for 1950 of \$785.60 at 16 mills on Appellant Libby's personalty at its true and full value of \$49,100.00 were paid with their attorney's letter (PR 40-42) of February 1, 1951, to Appellee's City Clerk, which sums were tendered in full payment of the 1950 taxes and were retained and not refunded by Appellee (PR 42, also 90). Appellant Libby had just recently received Appellee's tax bill (PR 41).

Taxes for 1951 \$2866.35 (\$2924.85—2%) at 16 mills on Appellants Railway's and Bellingham's respective properties at their true and full combined value of \$182,803.00 were paid with latter's letter (PR 44-45) to Appellee's Board of Trustees of December 7, 1951, which payment was retained and never refunded by Appellee (PR 45, also 90).

Municipal Tax Ordinances.

Appellee's Ordinance No. 1 was admittedly in effect through tax years 1950 and 1951 (PR 40, 90, 117,

196). This Ordinance (Appendix, pp. i-xvii *infra*) before this Honorable Court in its Case #14,562 (PR 85-102), also in Case #13,455 (PR 85-102). It is entitled "An Ordinance to provide for the assessment, levy and collection of taxes; and for the sale of property, both real and personal, for the payment of taxes, penalties, interest and costs", enacted July 3, 1948.

Evidence.

Appellee admitted that its Board of Trustees acted as its own assessor for both 1950 and 1951 and that the same tax valuation for 1949 was adopted *pro forma* for 1950 and 1951 (PR 196).

On Appellee's exhibit 2 (PR 190), introduced through witness Henry's testimony, under the two sections, one marked "1950-1951", the other "1951", neither giving the name or address opposite the word "owner", under the column headed "Board", not under the column headed "Assessor's", appear the figures "11,000" on the line opposite "land", "176,125" on the line opposite "improvements" in the "1950-1951" section and "176,625" on the line opposite "improvements" and "11,000" on the line opposite "land" in the "1951" section, and "94,000" on the line opposite "personal" in each section.

It plainly indicates that the purported assessed tax values, if any, are those of the Board, not of any Assessor, contrary to Sections 2, 3, and 4, Municipal Ordinance (Appendix, pp. i-iv *infra*).

Appellee's exhibit 2 (PR 190) was admitted (PR 189) over Appellant's Objections (PR 178-185, 187-

188). It is entitled "Tax and Assessment Roll No. 5" (PR 190). Witness Henry described it as the "Assessment book" (PR 186).

It doesn't conform to the purported Delinquent Tax Roll (PR 4), and nowhere mentions the name of Appellant Bellingham or its address as required by Sections 3 and 4, Municipal Ordinance (Appendix, pp. ii-iv *infra*); in fact, no owner's name or address appears on the top line, opposite "Owner" and "Address", in either section labelled "1950-1951" or "1951", or any name or even initials anywhere in the section labelled "1950-1951". On the margin outside of section labelled "1951" appear "Y&SSR" and "Bellingham".

In the section "1950-1951" (PR 190), under column headed "Board", on line opposite "Improvements" it has the figures "176,125", not "Frame Buildings, \$176,625" as shown on the Delinquent Tax Roll.

It does not show nor was any proof made that it was ever verified by the assessor or any city official as required by Sec. 4, Municipal Ordinance (Appendix, pp. ii-iv *infra*).

No proof was made that an assessor, if one ever was appointed for either 1950 or 1951, annually listed and assessed Appellants' respective properties for either 1950 or 1951 as required by Sec. 3, Municipal Ordinance (Appendix, p. ii *infra*), and by Sec. 16-1-65 ACLA 1949 (B. 13,455, p. 20), or that any such assessor took an oath of office as required by Sec. 16-1-54, *ibid* (Bf. 13,455, p. 20), both of which

statutes were made applicable to Appellee by Subp. 6th, Sec. 16-2-5, *ibid* (Bf. 13,455, p. 3).

Appellee's witness Henry testified she was the City Clerk (PR 177-206. Note: PR pp. 228-249 apparently are an inadvertent reprinting of PR p. 192, commencing with Henry's cross examination, through 5th line from top p. 214).

Over Appellants' objections that this Honorable Court's Opinion of July 8, 1953 (206 F2d 612), was the rule of law controlling this proceeding and was *res adjudicata* herein (PR 174) and that the performance of statutory and municipal requirements were jurisdictional (PR 176) and that it was in similar form to the Duplicate Delinquent Tax Roll before this Court in its Case #13,455, which this Court in said Opinion held invalid, the trial Court admitted (PR 186) as Appellee's Exhibit 1, the purported Delinquent Tax Roll for 1950 and 1951 (PR 4; 16), which Appellants discussed under Application (pp. 5-6 *supra*).

With Henry's testimony was also admitted as stated Appellee's Exhibit 2 (PR 190), over Appellants' Objections (PR 178-185; 187-188).

The trial Court itself first said of the Duplicate Delinquent Tax Roll for 1950-1951 (PR 4; 16): "Well, it seems that the roll doesn't conform to what the Court held it should be in so far as segregation is concerned, segregation of tax, penalty and interest" (PR 183). It is headed, except for years, the same as that before this Court in its Case #13,455, also #14,562 (PR 9, 16), viz: "Delinquent tax rolls for

the years 1950 and 1951 Delinquent from September 15th of said years.’’

Appellee admitted there was no dispute as to the amounts paid or valuations claimed by Appellants (PR 172). Those valuations were set out in Appellants’ Objections of September 8, 1952, namely: for 1950: Railway, realty \$99,000 and personalty \$7,200, and Libby, personalty \$49,100 (PR 11); and for 1951: Railway, realty \$99,000 and personalty \$7,200, and Bellingham, personalty \$76,603.00 (PR 11-12).

Appellants’ payments were also set out in those Objections, namely: for 1950, Railway, \$1,699.20 at 16 mills upon realty \$99,000 and personalty \$7,200, and Libby \$785.60 at 16 mills upon personalty \$49,100 (PR 11); and, for 1951, a 2% discount being taken because paid before delinquent, Railway, \$1665.22 at 16 mills upon realty \$99,000 and personalty \$7,200, and Bellingham, \$1201.13 at 16 mills upon personalty \$76,603.00 (PR 11-12).

Appellee admitted the payments (PR 203), also by its Responses (PR 90) to Appellants’ Requests 21 through 26 (PR 40-45) wherein is shown that the payments were remitted conditioned that they were in full payment of the taxes and wherein is shown that the payments remitted were retained and not refunded by Appellee.

The Delinquent Tax Roll (PR 4, 16) runs against *Bellingham, only*, although Appellee admitted that Bellingham bought Libby’s interests on May 5, 1951, and paid for all of the property within Appellee \$100,000 plus \$80,000 for inventory (PR 204-205); also

Appellants Railway and Bellingham, by witnesses, testified to their values in the fall of 1951 before the Board of Equalization and were not asked to testify under oath although willing to do so (PR 207-208).

Appellee admitted the salmon cannery was not operated after the 1948 until the 1951 salmon fishing season, and the immateriality of Libby's intent, which Appellants don't concede but deny, to operate not being carried out (PR 208-209).

Appellee admitted that the assessment for 1950 and 1951 (\$281,625 aggregate shown in Delinquent Tax Roll, PR 4, 16, although Appellee's Exhibit 2, PR 190, shows "176,125" for "1950-1951" not "176,625" as for "1951" opposite "Improvements") was carried from 1949 (PR 196). Appellants submit that the 1949 valuation of \$281,625 is based upon the 1948 valuation equalized at Appellee's Trustees' meeting on November 3, 1949, and took into account neither the removal of property nor non-operation of the cannery after the 1948 salmon fishing season (Bf. 13,455, pp. 85-86), and until the salmon fishing season of 1951 (PR 208-209), and was only equalized at that figure after Appellants Libby and Railway had agreed to it so to settle the controversy and contended that their combined properties were then of the value of \$190,250 (PR 151, Cases 13,455, 14,562).

The trial Court took the position that Appellee was not required to prove it had performed the jurisdictional requirements (PR 176).

The record is replete with evidence that Appellee complied neither with the statutory nor its own tax

ordinance requirements which has been pointed out (pp. 10-15 supra).

All evidence introduced in this Honorable Court's Cases 13,455 and 14,562 (trial Court No. 6581-A) in support of Appellants' objections therein was considered, the trial Court said, in this case (trial Court No. 6734-A) (PR 125).

QUESTIONS PRESENTED.

Appellants will try to cover their 14 Points (PR 256-259) in five propositions.

First—The trial Court was without jurisdiction because of Appellee's nonperformance of the statutory and municipal ordinance requirements in respect to the delinquent tax roll (PR 4, 16) and in respect to Appellee's Exhibit 2 (PR 190) (Points 3, 4, 5, 6, 7, 8, 10, 11, 12) (PR 257-258), and in the pretended assessment and levy of the claimed taxes.

Second—Appellee's witness Henry's evidence (PR 177-206), testamentary and documentary, Exhibit 2, (PR 190), was incompetent and inadmissible to extrinsically either impeach or show facts not disclosed by the delinquent tax roll (PR 4, 16). (Points 10, 11, 12, PR 258).

Third—This Honorable Court's opinion of July 8, 1953 (206 F2d 612), is the law governing this proceeding and its Mandate of August 19, 1953 (PR 335-337, Case 14,562), is res judicata of this proceeding (Point 1, PR 256).

Fourth—The Order of Sale (PR 128-129) disregards Appellants' uncontradicted, unimpeached, competent evidence as to the true and full values of their respective properties, is based upon witness Henry's incompetent and inadmissible evidence (PR 177-206), testamentary and documentary, Exhibit 2 (PR 190), and ignores Appellee's failure to prove the true and full values of Appellants' respective properties, either realty or personalty for either tax year 1950 or tax year 1951 (Points 2, 5, 7, PR 256-258), and to comply with statutory and municipal requirements.

Fifth—The Order of Sale (PR 128-129) allowed interest on claimed taxes although Appellee's tax Ordinances imposed or fixed no specific rate of interest payable thereon, and allowed Appellee an attorney fee contrary to law and despite Appellee had committed "a lot of irregularities" (PR 223), and applied contrary to Appellants' specific instructions, but as selected by Appellee, Railway's and Libby's payments of \$1,699.20 and \$785.60 for 1950 taxes (PR 11) and Railway's and Bellingham's payments of \$1,665.22 and \$1,201.13 for 1951 taxes (PR 12). (Points 9, 13, 14, PR 258-259).

FIRST PROPOSITION.

THE TRIAL COURT WAS WITHOUT JURISDICTION BECAUSE OF APPELLEE'S NONPERFORMANCE OF THE STATUTORY AND MUNICIPAL ORDINANCE REQUIREMENTS IN RESPECT TO THE DELINQUENT TAX TOLL (PR 4, 16) AND IN RESPECT TO APPELLEE'S EXHIBIT 2 (PR 190) (Points 3, 4, 5, 6, 7, 8, 10, 11, 12, PR 257-258), AND IN THE PRETENDED ASSESSMENT AND LEVY OF THE CLAIMED TAXES.

Appellants supplement their argument on this their First Proposition herein by their argument and the

judicial decisions and legal principles in their argument on their Second Proposition in Case No. 13,455 (Bf. 13,455, pp. 64-68), which was before this Honorable Court resulting in its Opinion of July 8, 1953 (206 F2d 612).

Heretofore herein (p. 5 supra) Appellants pointed out the similarity of the delinquent tax roll (PR 4, 16) to the delinquent tax roll for 1948 and 1949 taxes (PR 9-10; 13, Cases 13,455 and 14,562) which this Court held to be invalid in its said Opinion of July 8, 1953.

Appellee itself impliedly confessed its incorrectness otherwise why did it attempt to extrinsically impeach it and show purported additional facts by its incompetent, inadmissible Exhibit 2 (PR 190)?

The delinquent tax roll (PR 4, 16) lumps the taxes for each year of 1950 and 1951 without segregation of realty and personalty taxes; and lumps the two years penalty and interest together; shows no millage rate; and assesses the taxes, penalty and interest for the two years against Bellingham alone, although it had no interest in either the personalty or the realty until May 5, 1951 (PR 204). It is impossible from its face to compute the amount of taxes, penalty and interest upon realty alone or upon personalty alone for either or both of the two years.

Nor does Appellee's Exhibit 2, whose inadmissibility and incompetency is later discussed (Second Proposition, pp. 24-31 *infra*), aid in doing so; in fact, it adds nothing, other than stating "16 mills" on the

line opposite "1950-1951" and "1951". No name or address is written on the line opposite either "1950-1951" or "1951"; in fact Bellingham's name doesn't appear anywhere on Exhibit 2, except outside on the margin appears "Y&SSR" and "Bellingham", in the section headed "1951".

Appellee admitted (PR 195-200) Appellants' Objections 1, 2, 3, and 4 (PR 5-6) and 9 (PR 8) but claimed it had posted a notice (PR 200); also that no assessor had been appointed for 1950 or 1951, and that Appellee's Board of Trustees acted as its own assessor, and that the assessment for 1950 and 1951 had been carried from 1949, and that no person had been appointed by official action to post any notice or present the delinquent tax roll, other than by Appellee's ordinance, and that true and correct copies of Ordinances 1 and 2 are in the trial Court's Case No. 6581-A (PR 85-102, Cases 13,455 and 14,562).

Municipal Ordinance 1 (Appendix, pp. i-xvii; Ordinance 2 not being included because it was for 1948 only), which was in effect for tax years 1950 and 1951 (PR 40, 90, 117, 296) does not provide for posting any notice, but for publication only (Sec. 17, pp. xiv-xv, Appendix, *infra*).

Exhibit 2 (PR 190) does not show, nor was any evidence adduced, that the assessor or anybody made the affidavit required by Sec. 4, Municipal Ordinance (Appendix, pp. ii-iv *infra*), or that he ever took the oath required of all city officers by Sec. 16-1-54, ACLA 1949 (Bf. 13,455, p. 20).

Appellants submit that the evidence (Bf. 13,455, p. 20), shows Appellee's nonperformance of the statutory provisions of Sections 16-1-121 and 16-1-122.

The record contains no evidence of any listing or assessing by the assessor as required by Sec. 16-1-65, ACLA 1949, and Ordinance 1 (Appendix, pp. i-xvii *infra*) which admittedly was in effect for 1950 and 1951 (PR pp. 40, 90), and its Section 3 provides that the assessor shall annually list and assess the property.

Appellants submit that the provision in Sec. 16-1-122, ACLA 1949 (Bf. 13455, p. 8), i.e.: cities of not more than 1500 inhabitants may post, not publish, the notice of presentation of delinquent tax rolls, doesn't authorize Appellee to post such notice when its effective Ordinance (Appendix, pp. x, xv *infra*) provides the notice shall be published.

No evidence was adduced of even a resolution having been enacted to authorize posting, instead of publishing; in fact, no positive evidence even of posting.

This Honorable Court held that a general ordinance relating to taxes couldn't be amended by resolution.

Valentine v. Juneau, 36 F2d 904, 5 AFR 467, 471.

By its admission (PR 195-200) of Appellants' Objections 1, 2, 3, and 4 (PR 5-6), Appellee admitted no official action was taken.

The evidence clearly shows Appellee's nonperformance of the statutory provisions of Sections 16-1-54, 16-1-65, 16-1-112, 16-1-121, 16-1-122, and 16-1-123,

ACLA 1949 (Bf. 13,455, pp. 20, 4-5; 6-10) and the ordained provisions of Sections 3, 4 and 17, Municipal Ordinance 1 (Appendix, pp. i-xvii *infra*).

The trial Court said: "Now, I know there have been a lot of irregularities here."

In its Memorandum Decision (PR 118), filed June 10, 1954, it held in effect that no substantial rights of Appellants had been affected.

Appellants submit that all the authorities, cited to this Honorable Court in Cases #13,455 and 14,562 (Bf. 13,455, pp. 65-78), support their contention that these irregularities and failure to comply with the provisions of Sections 16-1-54, 16-1-65, 16-1-122, 16-1-121, and 16-1-123, ACLA 1949 (Bf. 13,455, pp. 20; 4-16), and of Appellee's Ordinance (Appendix, pp. i-xvii *infra*) have affected, even lost them, their substantial rights.

The U. S. Supreme Court, in a suit wherein a tax title was in controversy, said of the following irregularities:

1. No valid assessment for the year in question
 - a. Because the assessor did not take and subscribe the statutory oath or affirmation.
 - b. Such oath not endorsed upon the assessment books prior to their delivery to the assessor, as required by statute.
2. Failure to publish notice.
3. Failure of the Clerk to certify at the foot of the list of delinquent taxes, the name of the newspaper said list was published in, the date of publication, and the length of time.

4. Failure of the Clerk to attend the sale and make a record in a substantial book, etc.
5. Failure of the Clerk to take the property off the tax roll for the reason that it had been struck off by the state.
6. Failure of the Clerk to deliver to the Collector the tax book, with his warrant attached, thus authorizing the Collector to collect the taxes.
7. Failure of the collector to post notices (printed) of his attendance at certain places to receive the taxes, etc.
8. Failure of the collector to furnish a list to the Clerk of all such taxes that he had been unable to collect, for the purpose of striking from the tax list any exempt property.

“In the present case, it is contended by the appellant that the irregularities alleged by the Appellee were cut off under Section 5791 (Statute of Limitations), because they commenced no suit within two years from the date of the sale. But those irregularities deprived the appellees of a substantial right, and were not technical objections to the sale, and were prejudicial to the appellees.”

Martin v. Barbour, 140 U.S. 634, 643.

These irregularities before the U. S. Supreme Court are similar to, in fact, some of them are identical with, those committed by Appellee in respect to the Delinquent Tax Roll (PR 4, 16).

As stated by the U. S. District Court, W. D. Arkansas, wherein one of the irregularities was the

County Clerk's failure to attach his warrant to the tax books delivered to the Collector,

“The provisions of the law made for the protection and benefit of the taxpayer are mandatory.”

Conn. v. Little, et al., 101 F. Supp. 683, 684.

Appellants submit that the provisions of all of said statutes as well as of said Municipal Ordinance are for the benefit of the taxpayer, and that their performance is jurisdictional.

The publication of the notice of sale only once instead of three times as prescribed by Ordinance, was held a fatal defect in the proceedings:

McCaslin v. Hamlin, 223 P2d 326, 327, 328,

so here the failure to perform the statutory and municipal ordinance requirements not only affected Appellants' substantial rights but also is a fatal defect in these proceedings, and, as said by Judge Jennings, the trial Court had no jurisdiction until its action had been invoked in accordance with Sections 16-1-122 and 123 (Bf. 13,455, pp. 7-10).

In re Delinquent Tax Roll, 4 Alaska 721, 723, 726 (Bf. 13,455, pp. 65-66).

Moreover, Section 16-1-65, ACLA 1949 (Bf. 13,455, p. 20) mandatorily requires:

“The assessor shall once each year, at such time as the Council may direct, duly list and assess all the taxable property of the city at its just and fair value.”

That statute was made applicable to Appellee by Section 16-2-5, *ibid* (Bf. 13,455 pp. 2-3). Congress changed the words "just and fair" to "true and full value" on June 3, 1948.

Sec. 48-1-1, *ibid* (Bf. 13,455 pp. 21-22).

Sections 2, 3, and 4, Municipal Ordinance (PR 83-88), likewise require the assessor to make an annual listing and assessment, which the evidence shows was not done for either year.

SECOND PROPOSITION.

APPELLEE'S WITNESS HENRY'S EVIDENCE (PR 177-206), TESTAMENTARY AND DOCUMENTARY, EXHIBIT 2 (PR 190), WAS INCOMPETENT AND INADMISSIBLE TO EXTRINSICALLY EITHER IMPEACH OR SHOW FACTS NOT DISCLOSED BY THE DELINQUENT TAX ROLL (PR 4, 16) (Points 10, 11, 12, PR 258).

Appellants submit that Henry's testimony, with its documentary evidence (PR 19), was incompetent and inadmissible. It was admitted over their objection (PR 187-188). The document's vagaries were heretofore discussed (pp. 11-15 *supra*). It has no name opposite "owner" or address opposite "address" in either section "1950-1951" or "1951". Under the column "Board", not "assessor's", for "1950-51" appears on the line opposite land "11,000"; on the line opposite improvements, "176,125"; on the line opposite personal, "94,000"; on the line opposite "total" "281,625.00". Under the column "Tax" on the line opposite Total appears "4498.00". For "1951" under the column "Board", not "Assessor's", appears on

the line opposite land "11,000", on the line opposite improvements, "176,625"; on the line opposite personal, "94,000"; on the line opposite total "281,625.00". Under the column "Tax" on the line opposite Total appears "4506.00". Nowhere does Bellingham's name appear as owner, or even appear other than outside of the margin opposite Section "1951" appear "Y&SSR" and "Bellingham." Nowhere on it appear the sums shown as taxes on the delinquent tax roll (PR 4, 16).

Appellants challenged its competency in their objections of June 24, 1954 (PR 121) also in their Motion for New Trial (PR 135); also, on numerous occasions in Case No. 14,562 (trial Court No. 6581-A).

The duplicate delinquent tax roll which is presented to the Court is the primary record. After the hearing, the original is to be corrected from the duplicate, not the duplicate from the original (Sec. 16-1-126, ACLA 1949; Bf. 14,355, p. 12).

No Statutory Authority Exists to Amend, Enlarge, or Impeach by Extrinsic, Aliunde, or Other Evidence a Duplicate Delinquent Tax Roll Presented to the Court, or to Present a New Duplicate Delinquent Tax Roll.

The common definition of an assessment or tax roll or list is:

"While it seems that a paper or warrant containing a tax against a single place only may be regarded as a 'tax list' within the meaning of certain statutes, an assessment or tax roll or list

appears ordinarily to be a completed record for the year of all the taxable persons and property within the tax district, so arranged and itemized as to show to each taxpayer who may examine it exactly what property he is assessed on and the amount of tax he is required to pay thereon, although it may perform other functions.”

84 *CJS* 888, Sec. 454.

“An assessment list or roll can be made with proper legal effect only by the particular board or officer designated by the statute.”

Ibid, Sec. 455, p. 888.

Appellants submit no distinction exists between adding omitted property to a delinquent tax roll than to offer evidence to show that real and personal property taxes, instead of being lumped, were assessed separately and segregated.

An assessor may not add omitted property to the assessment roll unless authorized by statute.

Ibid, p. 957, Sec. 508.

The delinquent tax roll (PR 4, 16) shows realty and personalty taxes lumped together in one sum for 1950, also for 1951; penalty and interest each lumped in one sum for the two years without showing the penalty or interest separately against either the realty or personalty taxes, or for the separate years.

Exhibit 1 doesn't aid in computing the sums shown on the delinquent tax roll.

The Order of Sale (PR 128-129) allowed for 1950 realty taxes of \$2,033.20 and for 1951 of \$1,631.35.

Neither of those sums appear on the delinquent tax roll (PR 10, 16) nor on Exhibit 2 (PR 190).

No other evidence than Henry's was adduced in support of the delinquent tax roll (PR 4, 16), which is not competent or admissible evidence.

The rule is, in order to sustain an addition of property by tax assessors as omitted, it must appear that the items added were not assessed in the original assessment.

Ibid, p. 959, Sec. 508.

Even where reviewing boards or officers are authorized by statute to make corrections in the assessment roll, they must do so strictly in accordance with the statutory provisions.

Ibid, p. 998, Sec. 520.

Here there is no statutory authority for any one to make any corrections in the duplicate delinquent tax roll.

This same principle is also laid down in

Ibid, p. 1002, Sec. 521,

and in

Ibid, p. 1006, Sec. 522.

Section 16-1-122, ACLA 1949, specifically provides that which shall be contained in the delinquent tax roll, viz.:

“Such roll shall show therein the property assessed, the amount of the tax due, penalty and interest, separately stated on each tract assessed, to whom each tract is assessed, if assessed as unknown, so stated.”

The facts stated in the roll are conclusive. Appellee seeks by Exhibit 2 to establish other facts and to impeach the roll.

The Delinquent Tax Roll itself is the best evidence.

Ronkendorff v. Taylor, 7 L.ed. 882;

84 *CJS* 758, Taxation, §395;

Brink v. Dann, 144 NW 734, 736.

The only changes in it that the statute authorizes are payments made during time of publishing or posting and up to time of sale, Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 8), which must be endorsed upon both the original and the duplicate, and proportionate share of costs by the Clerk of the District Court on the duplicate. Sec. 16-1-125, ACLA 1949 (Bf. 13,455, p. 12).

“Extrinsic evidence is not admissible to establish facts which can be evidenced only by the assessment roll.”

84 *CJS*, p. 922, §485.

No statutory authority exists to correct any error in the roll by showing what the Appellee now claims is the correct amount of taxes that should have been assessed against the real property only.

Ibid, Sec. 520, p. 998, *supra*.

“The necessity, sufficiency, correction, and preparation of duplicate lists or rolls depend on statutory provisions.”

Ibid, Sec. 842, p. 920.

“Tax records and documents are commonly considered conclusive and not subject to impeachment by parol evidence.”

32 *CJS* p. 806, Sec. 883.

Affidavit of Service of notice to redeem from tax sale cannot be aided by parol.

Geil v. Babb, 242 NW (Iowa) 34.

Assessment roll. Insufficient description of land on assessment roll cannot be aided by extrinsic evidence, and name listed under heading of "owner" cannot aid description.

Ransom v. Young, 168 So. (Miss.) 473.

Plat book of an assessor cannot be impeached or varied by parol evidence as to the description of land.

Blayden v. Morris, 214 P. (Idaho) 1039.

Record of board of assessors, which is duly kept pursuant to statutory requirement, generally cannot be varied or added to by other evidence.

Carbone, Inc., v. Kelly, 194 N.E. (Mass.) 701.

Records of county commissioners as to whether a tract of land is seated or unseated and has been assessed, taxed, and sold by the treasurer cannot be varied by parol testimony or by the private record of an assessor.

McCall v. Lorimer, Pa. 4 Watts 351.

See also:

Trustees of St. Paul Methodist Episcopal Church South v. District of Columbia, 212 F.2d 244;

Tumulty v. District of Columbia, 69 App. D.C. 390, 400, 102 F.2d 254, 264;

Atchison, T. & S. F. Ry. Co. v. Elephant Butte, Irr. Dist., 10 Cir. 1940, 110 F.2d 767, 773;

Cooley, Taxation, Vol. 3 (4th Ed. 1924), 1046.

No evidence was adduced that the assessor, if there was one, which Appellants deny, ever made and subscribed an affidavit to Exhibit 2 (PR 190), if it is construed to be the assessment book, as required by Section 4, Municipal Ordinance (Appendix, pp. ii-iv *infra*) or that he annually and for either tax year 1950 or 1951 listed and assessed the property at its true and full value, as required by Sec. 3, *ibid* (Appendix, pp. ii *infra*), and by Sec. 16-1-65, *ACLA* 1949 (Bf. 13,455, p. 20), or that he took an oath of office as required by Sec. 16-1-54, *ibid* (Bf. 13,455, p. 20), or that he made or prepared Exhibit 2 (PR 190), which upon its face purports to show that the figures thereon are those of the Board, not of the Assessor, because no figures are under the column headed "Assessor's." They are under the column headed "Board," notwithstanding Sec. 3, Municipal Ordinance (Appendix, pp. ii *infra*), required the assessor to make the assessments. Therefore, the Exhibit 2 (PR 190) is not *prima facie* evidence of any listing, assessment, valuation or levy because on its face, with no proof to the contrary, it shows compliance with neither statute nor ordinance. Similarly, the Delinquent Tax Roll is not *prima facie* evidence of any assessment or levy for either tax year, because of nonperformance of statutory and municipal requirements.

People v. San Francisco Savings Union, 31 Cal. 132, 138.

National Distillers, etc., v. Board, etc., 256 SW 2d 481, 484.

84 CJS 752, Taxation § 392.

“Presumptions and burden of proof. As in other civil cases, the burden is on the plaintiff to establish a prima facie case and on the defendant to overcome it, and to establish his affirmative defenses. In a suit to enforce a tax lien, the burden is on plaintiff to show that the tax was legally assessed, legally committed to an officer for collection, and that the defendant was the owner or in possession of the land . . .”

85 CJS 83, Taxation §780.

THIRD PROPOSITION.

THIS HONORABLE COURT'S OPINION OF JULY 8, 1953 (206 F2d 612), IS THE LAW GOVERNING THIS PROCEEDING AND ITS MANDATE OF AUGUST 19, 1953 (PR 335-337, CASE 14,562), IS RES JUDICATA OF THIS PROCEEDING (Point 1, PR 256).

This Court in its Opinion (206 F2d 612) characterized this kind of a proceeding as a special proceeding; in fact, it is so characterized by the statute itself. Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 7). In that Opinion this Court said:

“If the amount were separately stated in the delinquent tax roll filed by the city with its application for order of sale, it would be presumed that the realty was properly assessed and that the amount stated remains unpaid.”

206 F2d 612, 616.

The amount has never been stated in any delinquent tax roll (PR 4, 16); nor in Appellee's Exhibit 2 (PR 190). That delinquent tax roll admittedly was

not prepared or presented in accordance with statutory or municipal ordinance requirements.

See: First Proposition, pp. 17-24, *supra*.

The Order of Sale (PR 128-129) says the delinquent realty taxes for 1950 are \$2033.20; for 1951, \$1631.35. The delinquent tax roll (PR 4, 16) says combined delinquent realty and personalty taxes for 1950 are \$2,021.20; for 1951, \$1,639.65. Exhibit 2 says combined realty and personalty taxes for 1950-1951 "4498.00"; for 1951, "4506.00" (PR 190). Based upon it, 16 mills for 1950-1951 upon "11,000" land and "176,125" improvements, assuming dollars are meant, would amount to \$2994.00; for 1951, upon "11,000" land and "176,625" improvements, assuming dollars are meant, would amount to \$3002.00. The record nowhere shows the sums of \$2033.20 or \$1631.35, which are mentioned in the Order of Sale (PR 128-129). They are arrived at in some manner by Appellee's counsel's computations.

Appellants submit that the principles announced by the United States Supreme Court and this Honorable Court and other Courts in many decisions clearly sustain their contention.

This Honorable Court's opinion of July 8, 1953 (206 F2d 612) said that "the amount of taxes, penalty, and interest due upon realty alone is not shown in the record", and was not separately stated in the delinquent tax roll, which is true herein, too.

Here the parties are the same as in Cases 13,455 and 14,562, except the assessment for both years in the delinquent tax roll (PR 4, 16) is against Bellingham only although it had no interest in the properties involved until May 5, 1951 (PR 204); the assessments are the same according to Appellee's counsel (PR 196), but the amounts are different because now the claimed millage rate is 16 mills; and Appellee failed to perform the same statutory and ordinance requirements, and further contrary to Section 17 of its Ordinance (Appendix, pp. xiv-xv *infra*) did not publish the notice of the delinquent tax roll, but claimed to have posted it (PR 200).

In *Harvey Coal Corporation v. U. S.*, Ct. Cl., 35 F. Supp. 756, wherein are cited *Cromwell v. County of Sac*, 94 U.S. 351, and *Tait v. Western Maryland Ry. Co.*, 289 U.S. 620, the Court said, at p. 762:

“The two proceedings, involving taxes for different years, are not the same, but the parties are the same and the question presented in this suit was before the Board, it was necessary for its decision; and it was decided by the Board. In such case, it is well settled that the Board's decision is *res judicata* in this proceeding.”

See, also:

New Jersey v. Martin, 115 F2d 968, 973;

W. H. Atkinson Co. v. Brown, 300 NW (Mich.) 102, 103.

The judgment “is a finality as to the claim or demand in controversy, including parties and

those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might* have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive as far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever." (Emphasis supplied.)

Cromwell v. County of Sac, 94 US 351, 24 L.ed. 195, 197, 198;

New Orleans v. Citizens Bank, 167 US 371, 396, 398.

FOURTH PROPOSITION.

THE ORDER OF SALE (PR 128-129) DISREGARDS APPELLANTS' UNCONTRADICTED, UNIMPEACHED, COMPETENT EVIDENCE AS TO THE TRUE AND FULL VALUES OF THEIR RESPECTIVE PROPERTIES; IS BASED UPON WITNESS HENRY'S INCOMPETENT, INADMISSIBLE EVIDENCE (PR 177-206), TESTAMENTARY AND DOCUMENTARY, EXHIBIT 2 (PR 190); AND IGNORES APPELLEE'S FAILURE TO PROVE THE TRUE AND FULL VALUES OF APPELLANTS' RESPECTIVE PROPERTIES, EITHER REALTY OR PERSONALTY, FOR EITHER TAX YEAR 1950 OR TAX YEAR 1951 (Points 2, 5, 7, PR 256-258), AND TO COMPLY WITH STATUTORY AND MUNICIPAL REQUIREMENTS.

The trial Court considered, in support of Appellants' Objections to the Tax Roll herein, the evidence adduced in Cases 13,455 and 14,562 (trial Court No. 6581-A) in support of the Tax Roll therein (Minute Entry of June 29, 1954, PR 125); therefore, Appellants supplement and adopt, as a part of this brief, and in support of this their Fourth Proposition herein, pages 78-86 of their brief in Case 13,455.

Appellee admitted (PR 172) there was no dispute as to the amounts paid or valuations claimed by Appellants (PR 172), which payments and valuations are set out in their Objections of September 8, 1952 (PR 11-12), viz.: for 1950, Railway \$1,699.20 upon realty valuations of \$99,000 and upon personalty valuation of \$7,200.00 and Libby \$785.60 upon personalty valuation of \$49,100, payments being based upon 16 mill rate; for 1951, Railway \$1,665.22 upon realty valuation of \$99,000 and upon personalty valuation of \$7,200, and Bellingham \$1,201.13 upon personalty valuation of \$76,603, payments being based

upon 16 mill rate but 2% discount being taken because payment made in full prior to delinquency.

Appellee admitted (PR 207-208) that Appellant Railway's and Bellingham's witnesses testified before the Board of Equalization in the fall of 1951 as to their valuations. Their total valuation of \$182,803 is also shown by Bellingham's letter (PR 44-45) of December 7, 1951, and that those witnesses had testified to them before the Board on October 30, 1951, which was admitted by Appellee's Answers 25 and 26 (PR 90).

Appellee also admitted Bellingham paid on May 5, 1951, \$100,000 for property within Appellee plus \$80,000 for inventory (PR 203-204).

Appellee also admitted by its Answers 22 and 23 (PR 90) Appellants Railway's and Libby's payments for 1950 made by its attorney and that the properties claimed total value was \$155,300 (PR 40-42).

The figures of realty taxes \$2,033.20 for 1950 and realty taxes \$1,631.35 in the Order of Sale (PR 128-129) do not appear in either the Delinquent Tax Roll (PR 4, 16) or Exhibit 2 (PR 190); in fact, Appellants can't find those figures anywhere in the record except in the Order of Sale.

Admittedly (pp. 20-21 *supra*), Appellee did not perform the jurisdictional acts required by the statutes and municipal ordinance.

Appellee contended, which Appellants do not concede, that they had not exhausted their administrative remedy (PR 172). Neither the trial Court's Memorandum Decision (PR 118), the Order of Sale (PR 128-129), nor elsewhere does the record show what, if any consideration, the trial Court gave to that contention.

In any event, Appellants submit that Appellee's nonperformance of statutory and ordinance jurisdictional steps made it unnecessary for them to do anything.

They contend that Sec. 7, Municipal Ordinance (Appendix, pp. v-vi, *infra*) is not authorized by Sec. 16-1-122, ACLA 1949 (Bf. 13,455, pp. 4-5), nor that noncompliance therewith limits the trial Court's jurisdiction under Sec. 16-1-124, ACLA 1949 (Bf. 13,455, pp. 10-12), to hear and determine, according to equitable principles, whether any tract was over-valued or over-assessed or whether the Board of Trustees had acted in bad faith.

Appellee is a public corporation, a political subdivision of the Territory. It has only such legislative powers as the Territory delegates to it. It is not an administrative body.

Appellants submit that, if the rule re exhaustion of administrative remedies applied, which they don't concede, the trial Court abused its discretion in holding that Appellants have no right to challenge the validity of the claimed taxes because of that rule when Ap-

pellee failed to make the assessment in the manner provided by statute and ordinance.

The application of that rule is a matter of judicial discretion.

“Whether it should have denied relief until all possible administrative remedies *were* exhausted was a matter which called for the exercise of its judicial discretion.”

U. S. v. Abilene, etc., Co., 265 US 274, 282.

Appellants submit that the Order of Sale (PR 128-129) is equally as invalid as the Order of Sale which this Honorable Court reversed in its Opinion of July 8, 1953 (206 F2d 612), and that the trial Court should have found under the provisions of Sec. 16-1-124, ACLA 1949 (Bf. 13,455, p. 11) that Appellants' respective properties had been over-valued and over-assessed \$125,825.00 for 1950 and \$98,822.00 for 1951, and that the Board of Trustees had not equalized the assessments in good faith.

While the differences in tax sums between those in the Delinquent Tax Roll (PR 4, 16) and those in the Order of Sale (PR 128-129) may be contended to be small, yet the principle applies:

“The excessive levy is in fact small and trifling,
* * * ‘The smallness of the amount of the excess over the amount due does not, in a tax sale, affect the question, as the maxim, *De minimis non curat lex*, does not apply to tax sales. The provisions of the law made for the protection and benefit of the taxpayer are mandatory’ * * *

“In *McCullough v. Maryland*, 4 Wheat. 316, 17 US 316, 429, 4 L.ed. 579, Chief Justice Marshall stated, ‘that the power to tax involves the power to destroy.’ This principle is pertinent when there is no power to tax or when the amount of the tax is not authorized. The right to extend a tax levy is dependent upon the authority to extend the specific tax at the legal and authorized rate.”

Conn v. Little, et al., 101 F.Supp. 683, 684, 685.

FIFTH PROPOSITION.

THE ORDER OF SALE (PR 128-129) ALLOWED INTEREST ON CLAIMED TAXES ALTHOUGH APPELLEE'S TAX ORDINANCE (Appendix, pp. i-xvii infra [Sec. 12] IMPOSED OR FIXED NO SPECIAL RATE OF INTEREST PAYABLE THEREON; ALLOWED APPELLEE AN ATTORNEY FEE CONTRARY TO LAW AND DESPITE APPELLEE HAD COMMITTED “A LOT OF IRREGULARITIES” AND THE STATUTE (Sec. 16-1-124, ACLA 1949; Bf. 13,455, p. 11) REQUIRED THE ADJUSTMENT OF THE ASSESSMENT ON EQUITABLE PRINCIPLES; AND APPLIED, CONTRARY TO APPELLANTS' SPECIFIC INSTRUCTIONS (PR 40-45), BUT AS SELECTED BY APPELLEE, RAILWAY'S AND LIBBY'S PAYMENTS OF \$1,699.20 AND \$785.60 FOR 1950 TAXES (PR 11) AND RAILWAY'S AND BELLINGHAM'S PAYMENTS OF \$1,665.22 AND \$1,201.13 FOR 1951 TAXES (PR 12). (Points 9, 13, 14, PR 258-259).

1. The Order of Sale (PR 128-129) held Appellants are “delinquent for a balance due on real property taxes as follows: for the tax year 1950, \$2,033.20, plus a penalty of 12%, being \$243.98, and interest at 1% monthly since the delinquent date of December 15, 1950, *on balance of delinquent tax*, being interest of

\$874.28; and for 1951 tax year \$1,631.35, plus penalty of \$195.76 and interest since December 15, 1951, at 1% monthly on *delinquent balance of tax*, being the sum of \$498.41; being assessed against "Appellants' real property". (Emphasis Supplied.)

None of these figures appear in the Delinquent Tax Roll (PR 4, 16), or in Exhibit 2 (PR 190), or elsewhere in the record.

The Delinquent Tax Roll (PR 4, 16) doesn't state that either the \$2,021.20 1950 tax or the \$1,639.65 1951 tax is on realty alone, or what part of either sum is for personalty taxes, nor does it segregate either penalty or interest as to either years, personalty or realty, or ownerships.

Exhibit 2 (PR 190) under the column headed "Tax" on the line opposite "Total" shows in section "1950-51" "4498.00" and in section "1951" "4506.00". Multiplying 187,125 (11,000+176,125) by 16 results in 2994 not \$2,021.20 for 1950, and multiplying 187,625 (11,000+176,625) by 16 results in "3002" not \$1631.35 for 1951.

While Appellants do not concede its competency, clearly evidence outside of the record must be used to arrive at the respective sums of \$2033.20 and \$1631.35 in the Order of Sale (PR 128-129).

See: *Conn v. Little, et al.*, 101 F. Supp. 683, 684, 685, *supra*, as to inapplicability of maxim, De minimis non curat lex.

Sec. 16-1-112 ACLA 1949 (Bf. 13,455, pp. 4-5), authorizes Appellee's Board of Trustees "to impose,

fix and provide for the collection of penalties for nonpayment of taxes when due, not to exceed 15% of such tax, and to fix the rate of interest on delinquent taxes and penalties, not to exceed 12% per annum.”

That section as well as Sections 16-1-111 through 131, Section 16-1-33, 16-1-54, 16-1-63, 16-1-65, 16-4-1, and 48-1-1, ACLA 1949 (Bf. 13,455, pp. 4-22), were extended to Appellee, which is a second class Alaskan municipality, by the 6th Paragraph, Section 16-2-5, ACLA 1949 (Bf. 13,455, pp. 2-3).

Section 12, Municipal Ordinance (Appendix, p. ix *infra*), provides: “On all delinquent taxes a penalty shall be added, which shall be at a sum equal to interest at the rate of 12% per annum from the date of such delinquency”.

Appellee’s Municipal Tax Ordinance (Appendix, p. xvii *infra*) nowhere else imposes or fixes either interest or penalty upon delinquent taxes.

The quoted Section is ambiguous; hence, should be construed most favorably to Appellants.

“In taxing statutes, doubts are resolved against the government.”

51 *Am. Jur.*, p. 616, § 650;

Gould v. Gould, 245 US 151, 153;

U. S. v. Merriam, 263 US 179, 187-188.

At most under the quoted Section, only 12% per annum from the date of delinquency can be allowed upon legally listed and assessed taxes if any are delinquent which there are not.

2. The Order of Sale (PR 128-129; 389) allowed "Costs of this hearing, including an attorney's fee to applicant of \$923.40 as for contested lien cases according to local rule No. 45."

This Honorable Court held this proceeding to be a special proceeding. 206 F2d 612.

Sec. 16-1-125, ACLA 1949 (Bf. 13,455, p. 12), provides for the allowance of "*the costs of publication of notice and hearing before the Court.*"

It makes no mention of an attorney's fee; hence, no attorney fee is allowable to become a lien upon Appellant Railway's realty. Costs of hearing undoubtedly mean witness fees and expenses of depositions, not attorney's fee for preparing application, notices, and proofs thereof.

The right to recover costs, including attorney fees, is statutory.

Mutual, etc., Ass'n. v. Moyer, 94 F2d 906 (CAA 9) 9 Alaska Reports 235, 240, cer. den. 304 US 581;

United Benefit Life Ins. Co. v. Elliott, et al., 11 Alaska Reports 466, 476.

Alaska has a general statute, no other, under which an attorney fee can be allowed as an item of costs, viz.:

"Disbursements allowed to party entitled to costs. Party's right to witness' and attorney's fees. A party entitled to costs shall also be allowed for all necessary disbursements, * * * and

a reasonable attorney's fee to be fixed by the Court."

Sec. 55-11-55, ACLA 1949.

"And a reasonable attorney's fee to be fixed by the Court" was included in that statute by amendment in 1947.

Ch. 84, ASL 1947.

The same words in Section 1, Ch. 38, ASL 1923, were construed by this Honorable Court in

Pond v. Goldstein, 41 F2d 76, 5 AFR 544, 556;

Forno v. Coyle, 75 F2d 692, 5 AFR 758, 766.

Inasmuch as this is a "special proceeding", Appellants submit that, without specific statutory provision, costs, as stated, do not include an attorney's fee.

The trial Court allowed attorney fees herein to Appellee although on July 28, 1954, it said, "I know there have been a *lot of irregularities here. There naturally would be*" (PR 223), (emphasis supplied), and, previously, in Case No. 13,455, in respect to the trial of January 18, 1952, had held "No attorney fee was allowed because of irregularities on the part of Yakutat of the kind that encourage litigation" (PR 30, No. 13,455).

Appellants submit that Appellee's irregularities in each proceeding consisted of failure to perform jurisdictional acts required by statute and municipal ordinance.

It should be borne in mind that though Appellee may be a small village and a second class Alaskan

municipality, it has throughout been represented by learned practicing counsel, William L. Paul, Jr., of Juneau and Seattle, and Frederick Paul of Seattle. This proceeding, no more than the suit No. 6302-A, which resulted unsuccessfully to Appellee (PR 157), was not instituted by men ignorant of or unlearned in the law.

The allowed attorney fee of \$923.40 was based upon the fee allowed as in contested lien cases under Local Rule 45, actually under Rule 45 of Uniform Rules of the District Court for the District of Alaska, effective April 30, 1953, adopted by all the District Judges of Alaska. It provides for allowance in a contested lien case of 30% on first \$1000, 15% on next \$4000, and 5% on next \$5000, etc.

It apparently is computed upon the total sum of \$5467.98 (1950 tax \$2033.20+penalty \$243.98+interest \$874.28+1951 tax \$1631.35+penalty \$195.76+interest \$489.41), although as hereinabove stated Appellee's Ordinance (Appendix, p. x *infra*) does not impose or fix any specific rate of interest on delinquent taxes; hence, the fee is partly based upon a sum of illegal interest.

Appellants submit the trial Court abused its discretion in allowing an attorney fee in the face of the "lot of irregularities" (PR 223) committed by Appellee and its admitted failure to perform the required jurisdictional acts (pp. 20-25, *supra*), and that the statutes do not authorize its imposition against the realty of Appellant Railway who was not even named in the Delinquent Tax Roll (PR 4, 16).

3. The Order of Sale (PR 128-129) inferentially, although not specifically so stating, must have approved or adopted, without evidence thereof, one or more of the methods of application suggested by Appellee's counsel, to the full payment of personalty taxes for 1950 and 1951, leaving unsatisfied realty taxes for 1950 and 1951, of Appellants Railway's and Libby's payments for 1950 made by its attorney (PR 11) and of Appellants Railway's and Bellingham's payments for 1951 (PR 11-12), despite those payments were remitted respectively conditioned that they were in full payment of both realty and personalty taxes (PR 40-45).

Appellee's municipal ordinances (Appendix, pp. i-xvii *infra*) do not provide for any such application by its attorney or anybody else. Appellee enacted no resolution to do so. Its attorney said, "That is entirely a matter of proceeding in court and I have made the commitment, and it is binding" (PR 193).

Previously he said: "We took all the money which was just generally given us for real and personal property and we applied it for the portion of the proceeding which should not be in the case, for which the City of Yakutat could not apply it—the Bellingham Canning Company on the delinquent tax roll, personal property. Now, we have that choice. Both sides acted in an illegal manner, so one jumps in and tries to correct it. That is all we have done" (PR 163).

Appellee admitted in its answers 22, 23, 24, 25, 26 (PR 90) that Appellants Railway and Libby for 1950 and Appellants Railway and Bellingham for 1951 had

remitted conditioned that they were in full payment of their respective taxes for 1950 and 1951 (PR 40-45).

Appellants deny that any of them have done anything illegal in regard to their taxes or this proceeding, but timely paid all of their taxes upon their respective properties at their true and full values and only seek to prevent payment of taxes at over-valuations and over-assessments without the Appellee's Board of Trustees equalizing them and to prevent the sale of Railway's realty for such unfair, excessive, over-valued and over-assessed taxes.

Appellee's counsel also said: "Well, his direction was to pay real and personal property taxes. He didn't send enough money, so we went ahead and * * * He didn't send enough money because there was a dispute as to valuation of personal property and to valuation of real property, but the application was directed to be made to the personal and real property taxes according to the amount they think is the right amount. There was no specific instruction for so much for personal and so much for real property, except in the sense that the categories are disputed in the amount of valuation. Our position now is that the personal property taxes, when we discovered the illegality of the activity of both sides, we applied in the proper manner, not inconsistent with any instructions given us. The personal property taxes are all paid, and part of the real property, too" (PR 164).

These statements are not sworn evidence. Neither the Delinquent Tax Roll (PR 10, 16) nor Exhibit 2

(PR 190) show credit of any payments. Again Appellants reiterate that their Requests (PR 40-45), which were admitted by Appellee (PR 90), show that their remittances were made conditioned "in full payment of all taxes", and that Appellee retained and did not refund them. Again Appellants deny they have done anything illegal in their taxes or in this proceeding.

In the cool dispassionate atmosphere of preparing sworn Answers to Interrogatories, Appellee's counsel said (PR 95-96): "This means that Bellingham Canning Company has paid its personal property tax and total based upon a \$94,000 valuation and the balance of the tax claimed is attributed to the personalty". If it was a misstatement he didn't correct it when it was read to the Court (PR 166).

Appellee's counsel didn't refute (PR 151) his affidavit (PR 114) that Appellants had paid Appellee "a sum more than sufficient to satisfy their personal property taxes, and such sum has been applied by Appellee to pay said personal property taxes, penalty, and interest, and there is nothing due thereon; and this matter concerns on real property taxes, interest and penalty."

Neither the Delinquent Tax Roll (PR 4, 16) nor Exhibit 2 (PR 190) shows credit thereon of payment of any taxes, not even personalty.

Appellants submit that Appellee, by receiving, collecting, retaining, and not refunding their remittances, which were made conditioned that they were in full payment of all taxes, is estopped not only to maintain

that any taxes, either realty or personalty, remain unpaid for either the tax year 1950 or 1951 but also to apply the proceeds of those remittances in any manner other than as directed in Appellants' remittal letters (PR 40-45).

Appellants had the right to direct the manner of application of their payments of \$1699.20 and \$785.60 for 1950 and of \$2866.35 for 1951.

“In making a payment on account of taxes, the taxpayer has a right to direct its application to a particular tax or to a particular piece or item of property, and the receiving officer is bound by such direction.”

Taxation: 84 CJS 1250, §627;

61 CJ 970, §1250.

“When a debtor directs the manner of application of his payment, the creditor, if he accepts payment, must apply it as the debtor requests.”

Payment: 48 CJ 646, §90;

70 CJS 261, §55.

Appellee should have refunded Appellants' remittances if it did not accept that sum in full payment of Appellants' taxes.

CONCLUSION.

Wherefore Appellants pray that the Order of Sale (PR 128-129) may be vacated and set aside and the application dismissed because:

1. The trial Court was without jurisdiction because of Appellee's nonperformance of statutory and municipal ordinance requirements in respect to the Delinquent Tax Roll (PR 4, 16); also, to Exhibit 2 (PR 190).

2. Appellee's witness Henry's evidence, testamentary and documentary (PR 177-206), was incompetent and inadmissible to extrinsically either impeach or show facts not disclosed by the Delinquent Tax Roll (PR 4, 16).

3. This Honorable Court's mandate of August 19, 1953, issued in Case No. 13,455, is *res judicata*, and this Honorable Court's opinion of July 8, 1953 (206 F.2d 612) in Case No. 13,455, is the law of the case.

4. The Order of Sale of June 29, 1954 (PR 128-129) disregards uncontradicted, unimpeached, competent evidence and its weight and credibility, and is based upon incompetent evidence, including Henry's evidence, testamentary and documentary (PR 177-210), and ignores Appellee's failure to prove the listing and assessing by the City Assessor for the tax years respectively commencing June 1, 1950, and June 1, 1951, at their respective true and full values either the realty or the personalty of Appellants.

5. The Order of Sale (PR 128-129) of June 29, 1954, erroneously allowed interest on claimed delinquent taxes; allowed Appellee an attorney fee and made it a tax lien on Appellant Railway's realty; and inferentially applied, contrary to Appellants' instructions, but as selected by Appellee, their remittances conditioned in full payment of their respective taxes for 1950 and 1951 at the true and full values of their respective properties.

Dated, Juneau, Alaska,
February 18, 1955.

Respectfully submitted,
R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

EXHIBIT "A"

AN ORDINANCE

to provide for the assessment, levy and collection of taxes; and for the sale of property, both real and personal, for the payment of taxes, penalties, interest and costs.

City of Yakutat does ordain as follows:

Section 1. All property within the corporate limits of the City of Yakutat, Alaska, both real and personal, of every nature, not exempt under the laws of the United States, or the Territory of Alaska, is subject to taxation for municipal purposes, and taxes upon such property must be assessed, levied and collected as provided by this ordinance and existing laws and existing ordinances of City of Yakutat which are now or may hereafter be in force.

Section 2. The Board of Trustees shall at its first regular meeting in May of each year appoint an assessor, and he shall at once, on or before the 25th day of May of each year, mail blank assessment forms to each property owner and holder residing in the City of Yakutat, at his request, and to the agents of non-resident property holders, if known, by their request, to whom property has been assessed the previous year, with instructions to list all property owned by them and all property under their control, at 12 o'clock m. on June first of the same year; and it shall be the duty of all owners of property

within the corporate limits of the City of Yakutat to prepare and deliver or mail to the assessor, upon the blanks provided at the office of the Clerk of the City and at such other places as may be designated, a list of all personal property owned by him or under his control within the City of Yakutat, together with the fair value thereof; and a list of all real property owned by him with a description of the same, and a list of all real property under his control as agent for any person, partnership or corporation, with a description thereof; and said statement shall be sworn to before a person authorized to administer oaths and returned to the assessor on or before June tenth of the same year.

Section 3. The assessor must, between the first Friday in May and the second Monday in July of each year, duly list all property in the City of Yakutat subject to taxation for municipal purposes, and he must duly assess such property at its just and fair value, to the person, partnership or corporation by whom it is claimed or owned, or in whose possession or under whose control it was at 12 o'clock m. on the first day of June in the same year; provided, however, that if such name be unknown to the assessor, he shall assess such property to unknown owner; and a mistake in the name of the owner or reputed owner of any such property shall not affect the assessment thereof nor render the same invalid.

Section 4. All property assessed by the assessor shall be listed and described sufficiently for purposes of identification, in a book prepared by the Board of

Trustees for such purposes; and on or before July 20 the assessor must complete his work and his assessment list, and must make and subscribe an affidavit to the assessment book, that the assessment therein contained is a full, true and correct assessment of the taxable property of the City of Yakutat to the best of his knowledge and belief for the current year (specifying it), and must deliver said assessment book together with such oath to the clerk of the City, together with all lists, books, statements, charts and maps relative thereto, and he must take a receipt therefor.

Prior to the delivery of such books to the clerk of the City of Yakutat, the assessor shall notify by postcard each and every person, partnership and corporation whose property has been assessed, in all cases where such persons reside in the City of Yakutat, and in cases where corporations have places of business or offices in the City of Yakutat, stating in such notices, the valuation placed upon the real and personal property of such person, partnership or corporation; and that the assessment list for the year (specifying it) will be filed with the clerk of the City on a certain date (specifying it), and the date, time, and place of the meeting of the Board of Trustees for that year sitting as a board of equalization. Like notices shall be mailed to all agents of non-resident property owners and holders, whether persons, partnerships or corporations, in all cases where the names of such agents are known; and if such property owners do not reside within the City of

Yakutat and have no agent residing therein, then such notice shall be mailed to the last known address of such property owner.

Section 5. The assessor shall receive for his services such compensation as shall be fixed by the Board of Trustees before the appointment of the assessor in each year. In case of the death, resignation or removal from office of the assessor before he shall have completed his work, the Board of Trustees may elect a successor to such assessor who shall complete the work of the assessor as herein provided, and he may certify and make oath to the assessment list as herein provided; and the oath and affidavit of the last appointed assessor shall be deemed a sufficient certification to said assessment book and tax roll; and in all such cases the Board of Trustees shall divide the compensation provided for making the assessment between the several assessors pro rated to the value of the services rendered by each.

Section 6. The Board of Trustees shall meet as a board of equalization on the last Monday of July of each year at the hour of 8 o'clock p.m. for the purpose of examining the assessment list, which shall also be known as the "tax roll" and equalize and revise the assessment for the current year where such equalization and revision is deemed necessary in the judgment of the Board of Trustees; and for the purpose of hearing complaints and protests on the part of taxpayers or owners of property assessed. The board shall adjourn over and continue its sessions from day to day for not less than three days nor more than ten

days, remaining in session not less than two hours each day, during which time it shall complete the revision and equalization of the assessment list for the current year. The Board of Trustees, sitting as a board of equalization, shall have full power, and it shall be the duty of the board to raise or lower the valuation of any property, real or personal, which may be by them deemed unequally or unfairly assessed; and they may add to the assessment list any and all parcels of real property, and any and all personal property, which they may find to have been omitted from such list, and to place a fair, just and correct valuation thereon; and such assessment and equalization of the board of equalization shall have the same effect as though such property had been originally assessed by the duly appointed assessor. The clerk of the City of Yakutat shall be ex-officio clerk of the board of equalization and he shall keep a record of the proceedings of the board and note all changes made in the assessed valuation of the board.

Section 7. Any person, partnership or corporation desiring a reduction in the assessment of any property assessed to such person, partnership or corporation, whether real or personal, shall make application to the board of equalization for such reduction. Such application shall be made either in writing, in which case it must be verified by the oath of the person, partnership or corporation desiring such reduction, or by the agent or attorney of such person, partnership or corporation, or such application shall be made before the board of equalization by such owner;

and in all cases the facts upon which the application is based shall be stated before the board, in cases where personal application is made; and they shall be set forth in writing in all cases where written application is made. Before the board of equalization grants the reduction applied for, the person, agent or attorney making the application may be examined on oath touching the value of the property of such person, partnership or corporation on whose behalf the reduction is sought; and no reduction shall be made unless such person or his agent or attorney, or some officer, agent or attorney of a partnership or corporation making the application, attends and answers all questions pertinent to the inquiry. And in all cases where written application for a reduction of assessment is made, the board may require the personal attendance before the board of the person, officer, agent or attorney making the application, or on whose behalf it is made, in order that such person summoned to attend may answer such questions as may be put to him by the board pertinent to the inquiry. For the purpose of such examination the members of the board of equalization and the clerk are authorized and empowered to administer oaths.

Section 8. During the session of the board of equalization it shall be the duty of the assessor to be present and answer, as far as he is able such questions as may be put to him by members of the board concerning the assessment of any taxable property within the corporate limits of the City; and the board may direct the assessor to assess any taxable

property that has escaped assessment, or to add to the amount, number or quantity of property when a false, incomplete or unequal list of assessment shall have been rendered; and to make and enter any assessment, and, if necessary, to cancel previous assessments; provided, however, that in all cases where any assessments are made or property added to the assessment roll, or the value placed on property by the assessor is increased, the owner, his agent, or the possessor of such property, if a resident of the district, shall be given notice of such action, which notice shall be delivered by messenger to such person, owner or agent or possessor of such property, or deposited in the post office, post-paid, addressed to him; and in all cases where the owner of such property is a non-resident, such notice shall be addressed to the agent of such property owner; and all such notices shall be mailed or delivered at least 48 hours before the final adjournment of the board of equalization for the year; and such notice shall state the value placed upon the property assessed, a brief description of such property, and the time when the board of equalization will adjourn for the year.

The clerk of the board shall record in a minute book all changes and corrections made in the assessment list or tax roll, and a record of all orders made by the board during its session relating to such assessment; and during the session of the board, or as soon as possible after its adjournment, he must enter upon the assessment book all changes and

corrections made by the board, and such changes and corrections must be complete within three days after the adjournment of the board of equalization; and the said clerk shall affix to the minute book containing the minutes of the meeting of the board of equalization, a certificate subscribed by him to the effect that he has kept correct minutes of all the acts of the Board of Trustees while sitting on the board of equalization, regarding changes made in the assessment list and tax roll, and to the effect that all changes agreed to and ordered to be made have been made and entered in said assessment book and upon said tax roll, and that no changes have been made upon said list or roll except those authorized by the board of equalization.

Section 9. The Board of Trustees shall meet on the Friday next after the adjournment of the board of equalization and fix the rate of tax levy for the year, designating the number of mills on each dollar of assessed value of property, real and personal, within the corporate limits of the City of Yakutat, for City purposes, as equalized by the board of equalization for that year; and the rate shall not exceed the rate provided by law.

Section 10. Within not more than three days after the day upon which the rate of levy shall have been fixed by the Board of Trustees, as hereinbefore provided, the clerk shall publish a notice specifying:

1st. That the Board of Trustees has fixed the rate of tax levy for the current year, designating the

number of mills fixed on each dollar of assessed value of the property assessed;

2nd. That the taxes are now due and will be delinquent on or before the 15th day of September of that year at 6 o'clock p.m., providing that one-half of the taxes shall not have been paid as in this ordinance hereinafter provided;

3rd. The penalty and interest which will be charged, as hereinafter provided;

4th. The time when and place where payment of taxes may be made;

5th. The amount of discount which will be allowed for payment in full on or before the date specified herein.

Said notices must be published once in a daily or weekly newspaper published and printed in the City of Juneau, Alaska; and posted in three conspicuous places within the City of Yakutat.

Section 11. The clerk is ordered, directed and empowered to collect all taxes for and on behalf of the City, and to do and perform every act and thing necessary and requisite in the collection of said taxes, and to give receipts therefor, and to keep the necessary records of the payment of such taxes.

Section 12. On the 15th day of September in each year at the hour of 6 o'clock p.m., all unpaid taxes shall become delinquent; provided, however, that if one-half of the assessed taxes shall have been paid on or before said 15th day of September in each year

before the hour of 6 o'clock p.m., the remaining one-half of said assessed taxes shall not become delinquent until the 15th day of March of the following year at the hour of 6 o'clock p.m., when the same shall become delinquent; provided, further, that if the taxes on any real or personal property are paid in full on or before the 15th day of September at 6 o'clock p.m. of the year in which they are assessed and levied, a discount of 2% shall be allowed on such taxes; and if such taxes are paid in full on or before the said 15th day of September of the year in which they are assessed, at 6 o'clock p.m., the clerk is authorized, empowered and directed to accept in full payment of such taxes, the amount of the same as levied and assessed, less 2%.

On all delinquent taxes a penalty shall be added, which shall be a sum equal to interest at the rate of 12% per annum from the date of such delinquency.

Section 13. During the period from the 15th day of September in each year to and including the 30th day of September and from the 15th day of March to and including the 30th day of March of each year, the clerk shall make a personal demand on all persons he is able to find to whom personal property has been assessed for the year and upon which taxes have not been paid, for the amount of taxes, penalties and interest upon such personal property; and during the ten days following the 30th day of September and March in each year, the clerk shall make written demand by letter on all such owners of personal property who shall not have been theretofore person-

ally notified, and shall require the owners of such property or the persons to whom the same has been assessed, to pay such taxes, penalties and interest forthwith.

Section 14. All taxes levied by the Board of Trustees pursuant to this ordinance and pursuant to the laws of the Territory, shall be a lien upon all property assessed, and such lien shall be prior and paramount to all other liens and incumbrances against the property assessed; and the owner of all real and personal property assessed shall be personally liable for the amount of taxes assessed against his property, and such tax, together with penalty and interest may be collected, after the same become due, either by distraint or in a personal action brought in the name of City of Yakutat against such owner in the courts of the Territory of Alaska, or both such methods of collection may be used, in the discretion of the school board.

Section 15. That in addition to the provision made for the collection of taxes by personal action against the owners of the property assessed as provided in the last section next above, a lien of personal property taxes may be enforced by distraint and sale of the personal property of the person assessed, and, if the taxes on any personal property, together with the penalty and interest thereon, shall not be paid upon the demand provided in this ordinance to be given by the clerk in the manner hereinabove provided, the Board of Trustees may issue a warrant authorizing and directing the clerk forthwith to seize, levy upon

and distrain and sell such personal property of the person assessed; and the clerk may take the same into his possession and sell the same upon public notice given for a period of not less than ten days, which notice shall be in writing and three copies of which, signed by the clerk, shall be posted in three public and conspicuous places within the City Limits, one of which shall be on the Bulletin Board of the City. The sale of such property shall be made at public auction, and such personal property shall be sold to the highest bidder for cash. From the proceeds of sale of such property the clerk shall pay first the costs and expenses of making such sale, if any, and the cost of the levy and seizure, including any expenses in the removal of said property from the possession of the owner and of keeping and storing same pending the sale, and he shall then retain an amount sufficient to pay the tax, penalty and interest levied against such property, and the remainder of such proceeds, if any, shall be paid to the owner of such property. All sales of personal property under this ordinance shall be made at a time of day to be fixed by the clerk in such notice, and the same shall be fixed between the hours of ten o'clock in the forenoon and five o'clock in the afternoon of the day of sale, and the said sale may be adjourned by the clerk from day to day for want of purchasers or sufficient bids, or if for any valid reason the clerk is prevented from attending at the time and place set for said sale, and the sale may be adjourned and continued from day to day, if necessary, until all of such personal property shall have been sold to pay the costs and expenses herein pro-

vided, and the tax, penalty and interest in full. If the proceeds of sale of such personal property are not sufficient to pay the tax, penalty, interest and costs, then the Board of Trustees may enforce the collection of such tax, penalty, interest and costs by personal action against the owner of such personal property as herein provided in the preceding section, and the Board of Trustees may, in its discretion, employ either or both of said methods for the collection of said taxes, and neither of such methods shall be deemed exclusive remedies.

On any tax sale of personal property, the sale to the purchaser or the highest bidder, shall vest in such purchaser the absolute title to such personal property, and the clerk shall make a return to the Board of Trustees of his proceedings, which shall set forth the date of levy, seizure or distraint, the date of the posting of the notices, places where such notices were posted, the date of the same, the amount received for such personal property, and how such amount was disbursed; and in all cases of sales of personal property, the clerk shall, if requested, give the purchaser a bill of sale on behalf of the City of Yakutat under his hand and the seal of said City.

Section 16. Whenever the tax on any real property assessed and levied pursuant to the provisions of this ordinance or pursuant to the provisions of law, shall not have been paid when due, as herein provided, the same may be collected, together with penalty, interest and accruing costs, and the payment of the same enforced in accordance with the provisions of Sections

1324 and 1325, Compiled Laws of Alaska, 1933, and all amendments thereto.

Section 17. On or before the first of June of each year the clerk shall make up a roll in duplicate of all real property assessed and on which the tax has not been paid and is delinquent. Such roll shall show therein a brief description or statement of the property assessed, which may be described by lot and block number or other description sufficient to identify it, and it shall show the amount of the tax due thereon, together with penalty and interest, separately stated, on such tract assessed, to whom each tract is assessed, if known, otherwise it shall be stated that the owner's name is unknown. The clerk shall endorse under his hand and the corporate seal of the City, upon said tax roll, a certificate to the effect that said roll is a true and correct roll or list of the delinquent taxes of the City for the year or years in which taxes have been levied and assessed, and showing the date when said taxes became delinquent, the total amount of delinquent taxes, penalty and interest, separately stated, and the aggregate of the whole thereof. If the taxes for more than one year be delinquent, such taxes and assessments separately shown, may be included in one tax roll; and, if for any reason the delinquent tax roll is not made up as herein provided for any one year, the same may be made any year thereafter, and shall include all the requirements herein provided for all years during which taxes shall have been delinquent and are unpaid. Said roll, so made up, shall be known as the "delinquent tax roll"

of the City of Yakutat for the year or years for which the same is made up, the original of which shall be filed with the clerk and remain in his office open to the inspection of the public. As soon as the clerk, or such other officer as may be designated by the Board of Trustees, shall, under the direction of the Board of Trustees, cause to be published in a newspaper of general circulation published within the City of Juneau, Alaska, either weekly or daily, once each week for a period of four successive weeks, a notice under the hand of the clerk, setting forth that the delinquent tax roll of real property for the years in which taxes have been delinquent (specifying them) has been completed and is open for public inspection of such notice, the said roll will be presented to the District Court for the Territory of Alaska, Division Number One at Juneau, for judgment and order of sale. Said roll shall describe each tract on the roll on which the tax has not been paid, the amount of tax, penalty and interest due thereon, stated separately for each year, and the name of the person, partnership or corporation to whom assessed, if known, and if unknown it shall be so stated in said notice.

During the period of publication of such notice and up to the time of the order of sale, hereinabove provided, any person may appear and make payment on any piece, parcel or tract of real property set forth in said roll, together with the penalty and interest; and the clerk or other officer designated by the Board of Trustees shall make proper record of such payment on both the original and duplicate delinquent tax roll.

Section 18. On the day specified in said notice, or as soon thereafter as a hearing can be had before the court, the clerk, attorney, or other officer designated by the Board of Trustees, shall present the duplicate tax roll so completed as aforesaid, together with proof of publication of the notice provided in the preceding section, to the District Court aforesaid, for an order of sale of all real property therein listed, on which taxes have not been paid and are delinquent, and such proceedings shall be had in connection with the issuance of such order of sale as are provided by the laws of the Territory of Alaska; and all property upon which taxes shall not have been paid and upon which taxes, penalties and interest are due and payable and delinquent as hereinabove provided, shall be sold, as provided in Sections 1324 and 1325, Compiled Laws of Alaska, 1933, and all amendments thereto; and all proceedings shall be had with reference to notice of sale, the sale of property, the execution of certificates and deeds as are provided by the laws of the Territory of Alaska.

Section 19. No objection shall be entertained by the court to the amount of any tax levied pursuant to this ordinance and the laws of the Territory of Alaska, unless it appear at the time of the hearing before the court, as hereinbefore provided, that the owner of the property assessed and on which a reduction is sought, or someone on behalf of the owner shall have appeared and presented said objection in the manner prescribed by this ordinance before the board

of equalization for the year in which the assessment in question shall have been made.

Section 20. The term "real property" when used in this ordinance, shall include not only land itself, whether laid out in lots or otherwise, but also all buildings, structures, improvements, fixtures, of whatsoever kind thereon, and all possessory rights and privileges belonging or in anywise appertaining thereto, including possessory rights to tidelands; and the word "tract" shall include all lands, pieces or parcels of land, which may be separately assessed, together with the fixtures and improvements thereon; and the term "personal property" shall include all property defined as such by the laws of the Territory of Alaska.

Section 21. Wherever the word "person" occurs in this ordinance, it shall be deemed to include partnerships, firms and corporations, the singular shall include the plural, the masculine shall include the feminine and neuter.

Section 22. This ordinance shall be published by posting copies of the same in three public and conspicuous places in the City of Yakutat, for a period of thirty days, and it shall be in full force and effect from and after the date of its passage and approval.

Passed and approved by the Board of Trustees of the City of Yakutat, on this 3 day of July, 1948.

/s/ J. B. MALLOTT

Mayor.

Attest:

/s/ DAVID C. HENRY

Clerk.

EXHIBIT "B"

ORDINANCE No. 2

An Ordinance to provide for the assessment, levy and collection of taxes for the year 1948-9 by amending the dates thereof as set forth in Ordinance entitled "An ordinance to provide for the assessment, levy and collection of taxes; for the sale of property, both real and personal, and for the payment of taxes, penalties, interest and costs," passed and approved July (3), 1948.

City of Yakutat Does Ordain as Follows:

Section 1. That the ordinance passed and approved July (3), 1948, and entitled "An Ordinance to provide for the assessment, levy and collection of taxes; for the sale of property, both real and personal, and for the payment of taxes, penalties, interest and costs," be and it is hereby amended as follows:

In Section 2 of said ordinance, the election date of the assessor shall be on the first Saturday of July, 1948; the assessor shall mail blank assessment forms on or before July 25, 1948; the list of property shall be as of August 1, 1948 at 12 o'clock noon, in place of June 1; and such list of property shall be returned to the assessor on or before August 10, 1948.

In Section 3 of said ordinance, the listing and assessment of all property by the assessor shall be between July 7, 1948 and September 12, 1948, of property of the value and of the ownership as of August 1, 1948.

In Section 4 of said ordinance, the assessor must complete his work and assessment list on or before September 12, 1948.

In Section 6 of said ordinance, the meeting of the Board of Equalization shall commence on the last Monday of September, 1948.

In Section 12 of said ordinance, taxes shall become delinquent on November 15, 1948, at the hour of 6 o'clock p.m.; if taxes are paid in full on or before September 15, 1948, at 6 o'clock p.m., the 2% discount shall be allowed.

In Section 13 of said ordinance, the Clerk shall make personal and/or written demand for payment of taxes between November 15, 1948, and November 30, 1948.

Section 2. The mill rate of taxation provided to be set in said ordinance shall be applied by the Clerk in the collection of taxes to the extent of $87\frac{1}{2}\%$ thereof.

Section 3. This ordinance shall be published by posting copies of the same in three public and conspicuous places in the City of Yakutat, for a period of 30 days, and it shall be in full force and effect from and after the date of its passage and approval to May 1, 1949.

Passed and approved by the Board of Trustees of the City of Yakutat, this 3rd day of July, 1948.

J. B. MALLOTT,
President of the Board of Trustees
and ex-officio Mayor.

Attest:

DAVID C. HENRY,
Clerk

EXHIBIT "C"

ORDINANCE No. 8

An Ordinance to Amend Ordinances Nos. 1 and 2 Relating to the Assessment and Collection of Taxes by Changing the Date of Delinquency of Taxes from September 15th to November 15th, 1948.

Be It Ordained, by the City of Yakutat, Alaska, that for the year 1948, Ordinances Nos. 1 and 2 be and hereby are amended so that payment of taxes shall become delinquent on November 15, 1948 in place of September 15, 1948.

Passed and approved by the Board of Trustees this 4th day of September, 1948.

/s/ JAY B. MALLOTT,
Mayor, City of Yakutat

Attest:

/s/ DAVID C. HENRY,
Clerk

**United States Court of Appeals
For the Ninth Circuit**

YAKUTAT & SOUTHERN RAILWAY, a Corporation; LIBBY,
MCNEILL & LIBBY, a Corporation; and BELLINGHAM
CANNING COMPANY, a Corporation, *Appellants,*

vs.

THE CITY OF YAKUTAT, *Appellee.*

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF
ALASKA, DIVISION NUMBER ONE

BRIEF OF APPELLEE

WILLIAM L. PAUL, JR.
Attorney for Appellee

542 East 94th St.
Seattle 15, Washington

THE ARGUS PRESS, SEATTLE

FILED

APR 26 1955

PAUL P. O'BRIEN, CLERK

United States Court of Appeals
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WILLIAM L. PAUL, JR.
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542 East 94th St.
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United States Court of Appeals For the Ninth Circuit

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| YAKUTAT & SOUTHERN RAILWAY, a Corporation; LIBBY, McNEILL & LIBBY, a Corporation; and BELLINGHAM CANNING COMPANY, a Corporation, <i>Appellants,</i> | } No. 14561 |
| vs. | |
| THE CITY OF YAKUTAT, <i>Appellee.</i> | |

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF
ALASKA, DIVISION NUMBER ONE

BRIEF OF APPELLEE

PLEADINGS

This case is very similar to No. 14652. The court on April 7, 1955, consolidated them for purposes of argument.

This case commenced with the filing of an application on October 15, 1952, against real property then owned by Bellingham Canning Company. Attached to this application is the duplicate delinquent tax rolls of appellee for the tax years 1950 and 1951 (Tr. 15-18). These rolls are embodied in a notice that the rolls will be presented to the District Court for the Territory of Alaska for judgment of order of sale.

The Duplicate Delinquent Tax Rolls contain a statement of real and personal property, the valuation attributable to each, the tax due for each of the years, and the

aggregate penalty and aggregate interest, and grand total. The name of the reputed owner is stated as Bel-
lingham Canning Co.

On the same October 15, 1952, the Objectors Yakutat & Southern Railway, Libby, McNeill & Libby, and Bel-
lingham Canning Company, appeared with numerous
objections, all of which are of the same type as this
Court has disposed of or is considering in No. 14652.

These objections fall into three categories:

1. Technical objections as to manner and place of
posting of notices, appointment of assessors, qualifica-
tions of assessors, etc.

2. Objection of excessive valuation between \$187,625
fixed by the Board of Equalization, and \$99,000 claimed
by the owners, appellants herein.

3. Objection of bad faith valuation, on which no evi-
dence was introduced by appellants, except insofar as
the difference in valuation amounting to bad faith
per se.

All pertinent minutes of appellee's Board of Trustees
(City Council) and Board of Equalization were intro-
duced in evidence (Tr. 27-64).

On the trial on May 10, 1954, the duplicate delinquent
tax roll was admitted in evidence as Applicant's Exhibit
No. 1 (Tr. 116). Page 5 of the Assessment Book was
introduced as Applicant's Exhibit No. 2 (Tr. 116, and
190). Attorneys for all parties stipulated that the Ob-
jectors' witnesses would testify that the value of the real
property was as stated in their objections (Tr. 116). Ap-
plicant admitted all the technical objections urged by

Objectors but claimed them to be immaterial (Tr. 116 and 193 *et seq.*). Ordinance No. 1 was stipulated into evidence (Tr. 116). On rebuttal the applicant proved an ordinance directing posting of notice of presentation of delinquent tax roll to District Court instead of publication, as permitted by Sec. 16-1-122 A.C.L.A. 1949 (Tr. 212-214).

On June 18, 1954, the trial court made its memorandum decision (Tr. 118) that objections were either lacking in merit or such as not to affect the substantial rights of the objectors, and granted the application (Tr. 128) on June 26, 1954. Objections thereon were heard on June 29, 1954, which resulted in a minute order overruling the objections and including an order that the trial court regarded as in evidence all evidence adduced by the property owners and applicant in the first case (No. 6581-A, Tr. 125). On July 28, 1954, the Objectors asked to have this minute order (of June 29, 1954) amended to show that applicant admitted the events alleged in the technical objections but denied the legal conclusions drawn therefrom by Objectors. The minute order was amended as Objectors requested.

STATEMENT OF THE CASE

The instant case and No. 14652 are so much alike that on the motion for new trial (Tr. 134) as well as on the motion for summary judgment (Tr. 112), the appellants urged the Doctrine of *Res Judicata*.

In view of the fact that these are *in rem* proceedings, we agree that the principle applies, although we do not agree with counsel's view of his result herein. The same

real property is involved in both cases. In No. 14652 (6581-A below, former appeal No. 13455 in this Court, and reported at 206 F.(2d) 612), the objectors and appellants are the railway and Libby. In the instant case, the objectors-appellants are the same for the first tax year commencing June 1, 1950, to May 5, 1951, whereupon the objector-appellant becomes Bellingham—in this sense Bellingham is the successor of Libby (the railway being a wholly owned subsidiary of the corporation Libby), especially since it seeks to reap the fruits of its predecessors' work in No. 14652. This explanation is made to show that the Doctrine of the Law of the Case is applicable here for all the technical objections advanced by the appellants in both cases.

Accordingly, no duplication of statement of facts and law on such points is made, for if the case No. 14652 falls on the technical objections, this one equally falls.

The two cases do differ in that the appellants in the instant case appeared before the Board of Equalization at an agreeable time and in an agreeable manner. In the former case, no appearance with real evidence had been made before the Board of Equalization, and accordingly the trial court struck all the objectors' evidence because they had not exhausted their administrative remedy.

The appearance of the objectors herein before the Board of Equalization appears at Tr. 58 *et seq.*, and was rejected by the Board. No explanation appears for the rejection from the appellants either before the Board or in the trial court. The appellee states cause of rejection as based on the report of the engineer Toner show-

ing a valuation of an almost identical amount for real property, and the evidence that had already been presented to the trial court in the other case (Tr. 58 *et seq.*). The appearance of the property owners before the Board showed several different figures of valuation.

The other aspect whereby this case differs from No. 14652 (on the previous appeal 13455), relates to the notice of presentation of the delinquent tax roll to the District Court. Ordinance No. 1 required publication in a newspaper of general circulation. An ordinance amendment, the text of which was not introduced in evidence, had been made (Tr. 212-213) before the "last case" (referring to No. 6581-A, No. 13455, No. 14652, Tr. DC record March 6, 1952). The discovery of the exact terms of this ordinance has not been pursued on a deposition after appeal. The basis for such ordinance amendment appears at Sec. 16-1-122 ACLA 1949, where a town has less than 1,500 population and no newspaper of general circulation.

As in the other case, no evidence was presented by appellants directly showing bad faith in the valuation of their property, and the trial court overruled the charge in its memorandum decision (Tr. 118).

The charge of bad faith in valuing the property was considered at length in No. 14652 by the trial court and overruled (See that record p. 38-40).

The part payment of tax was made by Appellants' attorney in exactly the same manner as in the other case—payment in full according to appellants' valuation coupled with a "condition" that such payment was in full.

The payment was accepted by the appellee without the condition of compromise (Tr. 95).

The Applicant's Exhibit No. 1 (Tr. 15, 116) states the amount due for balance of real property taxes against real property plus penalty and interest.

The Applicant's Exhibit No. 2 (Tr. 16, 116, 190) eliminates any possibility that personal property is involved herein, as a matter of computation.

The final judgment of order of sale is based on the computation of balance due of real property taxes (plus penalty and interest on principal balance due) and costs.

From such judgment, this appeal is taken.

QUESTIONS PRESENTED

1. Technical objections as to the manner and place of posting notices of presentation of delinquent tax roll, appointment of assessors, qualification of assessors, etc., do not affect the substantial rights of the objectors, and this case should be governed by the rule announced in No. 13455, 206 F.(2d) 612. This is appellants' first, second, third, and part of the fifth points (Brief 15).

2. Libby, McNeill & Libby for 1950 did not appear with evidence before the Board of Equalization and should not now be permitted to try any question of excessive valuation. Bellingham Canning Company appeared before the Board but then and in the trial did not carry the burden of showing the difference in valuation to be anything more than a difference of opinion and thus not affecting their substantial rights. Appel-

lants offered no evidence of bad faith valuation. This is appellants' fourth point.

3. The ordinance allows interest.

ARGUMENT

Again counsel shows his dislike of the statute upon which this proceeding is based. This statute is Title 16, Chap. 1, Article 7, entitled ENFORCEMENT OF TAX LIENS ON REAL PROPERTY, A.C.L.A. 1949. Throughout both these cases, counsel has wholly ignored any explanation of how Sec. 16-1-124 fits into our Governments. This section, insofar as material here, follows:

“OBJECTIONS TO ASSESSMENT, TAX OR ORDER OF SALE: FORM AND CONTENTS HEARING: EVIDENCE: DECISION AND RELIEF: COSTS. Any person owing, or having any legal or equitable interest in, or a lien upon any tract listed in said duplicate delinquent roll, may appear and present at the time of hearing before the court, his objection, and contest the validity of the assessment or tax on such property, or the granting of the order of the sale thereof. Such objection shall be in writing and specify the grounds of objection to the assessment or tax on the particular tract represented in such objection and the court will hear and determine such objection and render such decision thereon as may be legal and just. At such hearing the duplicate tax roll shall be *prima facie* evidence of the regularity and legality of the assessment and levy of the tax and that the same is unpaid, and no objection to the valuation of the property, the manner of the assessment and levy of the tax, or any of the subsequent proceedings shall be entertained by the court which does not effect the substantial rights of the party interposing the objection * * * ”

In the other case on the first appeal this Court found at 206 F.(2d) 612, 616: "Ordinarily, the errors noted would not require reversal of the order in toto."

Counsel cites some very good law that tax statutes are to be strictly construed. Appellants make no claim that the statute is invalid or unconstitutional. We can only conclude that this statute is to be construed strictly liberally.

First Question

Technical objections as to the manner and place of posting notices of presentation of delinquent tax roll, appointment of assessors, qualification of assessors, etc., do not affect the substantial rights of the objectors, and this case should be governed by the rule announced in No. 13, 455, 206 F.(2d) 612.

Counsel urges the same idea in his third point as "*res judicata*."

This proceeding started out as one against real property owned by Bellingham Canning Co. (Tr. 16). Libby, McNeill & Libby and its wholly owned subsidiary (former record No. 13455, p. 286) Yakutat & Southern Railway appeared voluntarily for its *sub modo* interest for the tax year 1950.

Identical real property is involved in both cases. The valuations are identical. Identical procedure was used by the appellee for all three tax years except as follows:

1. For the tax year 1951, Bellingham Canning Company appeared before the Board of Equalization with evidence. While the appearance was informal, all parties were satisfied with the manner (Tr. 173).

2. Shortly after May 7, 1951, the appellee had adopted an ordinance permitting *posting only* of the notices of presentation of the delinquent tax roll to the District Court (Tr. 247, where the testimony of Mallott identifies the adoption as "shortly after the last case in court * * * the 1949 cases * * * ").

3. The application has attached to it a duplicate delinquent tax roll segregating the personalty from the realty.

On the technical objections, therefore, we suggest that the Doctrine of the Law of the Case is applicable for 1950 which concerns Libby. And that the Doctrine is similarly applicable to 1951 because Bellingham is successor in interest.

While this is not a literal application of the Doctrine (because after all this is a different case than No. 14652 and the former appeal No. 13455), still the idea is the same—a court should take judicial notice of its ruling in a former case involving the same issues of law and fact.

Accordingly, appellee adopts by reference the decisional authorities stated in its answering brief in No. 14652, which commence at page 22, on the Doctrine of the Law of the Case. This permits the elimination of a large number of pages of copy work such as constitutes almost verbatim the major portion of counsel's argument in this case carried over from No. 14652.

Second Question—1950

LIBBY for 1950 did not appear with evidence before the Board of Equalization and should not now be permitted to try any question of excessive valuation.

This is effectively disposed of in the other brief. See page 26.

We do not think Chief Justice Marshal should be so ungratefully treated at page 39 as to attribute to him out of context "the power to tax involves the power to destroy." Especially since Justice Holmes said quite some time ago of this phrase: "Not while this Court sits."

Second Question As to Bellingham—1951

Bellingham appeared before the Board of Equalization but then and in the trial court did not carry the burden of showing the difference in valuation to be anything more than a difference of opinion and thus not affecting their substantial rights.

On the first trial of the other case (No. 13455), the trial court considered a similar situation, and found adversely to appellants. See page 28 of our brief in No. 14652. Obviously there was nothing else the trial court could have done, because it was confronted with the evidence of the engineer-appraiser Toner that the real property was worth \$183,000!

No direct evidence is offered that the difference in valuations between the appellee and the appellants is attributable to bad faith of appellee—appellants could only be said to infer that the difference is malice *per se*. The inference falls automatically when the trial court finds that the difference is attributable only to a difference of opinion.

Third Question

The ordinance allows interest.

The ordinance at section 12 takes advantage of the

enabling act, Sec. 16-1-112 A.C.L.A. 1949, to provide for interest on delinquent taxes of 1% monthly. The ordinance is narrative in form. Apparently this is sufficient to satisfy the Alaska court as to the Alaska practice. If the section were not enactive in nature, there would have been no reason for the words "from the date of such delinquency." The section could have been stated in better form, but certainly there is no doubt in it that interest is provided for.

CONCLUSION

We state very frankly that we are tired from reading counsel's briefs. From counsel's viewpoint, we get a strong impression that neither the Board of Equalization nor the trial court did one single thing correctly, except allow him more time to docket this appeal. We suggest that the utter contempt of mind counsel has for appellee (and the support given it by the trial court) is expressed in his desire to emasculate a political subdivision of Alaska, appearing in his final statement at page 48:

"Appellee should have refunded Appellants' remittances if it did not accept that sum in full payment of Appellants' taxes."

The order of sale, being in conformity with what this Court has decided, should be affirmed.

Respectfully submitted,

WILLIAM P. PAUL, JR.
Attorney for Appellee

April 14, 1955

542 East 94th Street,
Seattle 15, Washington.

No. 14,561

IN THE

United States Court of Appeals
For the Ninth Circuit

YAKUTAT & SOUTHERN RAILWAY, a corporation; LIBBY, McNEILL & LIBBY, a corporation; and BELLINGHAM CANNING COMPANY, a corporation,

Appellants,

vs.

THE CITY OF YAKUTAT, a municipal corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

R. E. ROBERTSON,

ROBERTSON, MONAGLE & EASTAUGH,

P. O. Box 1211, Juneau, Alaska,

Attorneys for Appellants.

FILED

MAY - 6 1955

PAUL P. O'BRIEN, CLERK

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IN THE
United States Court of Appeals
For the Ninth Circuit

YAKUTAT & SOUTHERN RAILWAY, a corporation;
LIBBY, MCNEILL & LIBBY, a corporation;
and BELLINGHAM CANNING COMPANY, a corporation,

Appellants,

vs.

THE CITY OF YAKUTAT, a municipal corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

QUESTIONS PRESENTED.

Appellants (Main Brief, pp. 16-48) present five Questions or Propositions. Neither the facts nor the law thereof has been met by Appellee in its Brief either in the Three Questions (Appellee's Bf. 6-7), into which Appellee seeks to resolve Appellants' Five Propositions nor in Appellee's Argument (Bf. 7-11).

Appellants believe that an extended Reply is neither necessary nor apposite, but they will point out what they think are a few of the most glaring mistakes or inconsistencies in Appellee's Brief.

TECHNICAL OBJECTIONS.

Appellee illogically contends that its failure to perform statutory and ordinance requirements constitutes only a technical objection (Appellee's Bf. p. 6).

Appellee entirely ignores the U. S. Supreme Court and many other decisions cited by Appellants (Bf. 17-24) that such nonperformance affected and caused Appellants to lose their substantial rights.

In its argument (Bf. p. 7), Appellee suggests that Appellants' counsel has no liking for Sec. 16-1-124, ACLA 1949 (Appellants' Main Bf. Case #13,455, pp. 10-12), and has ignored that statute, of which Appellee quotes only a portion, omitting entirely its further provisions, viz.:

“* * * If at such hearing the court shall find any tract to be over valued, or over assessed, the same shall be adjusted on equitable principles so that the same shall bear its just proportion of the levy, and the invalidity of the tax on any one tract shall not be considered as a presumption of the illegality of the tax on any other tract. Provided, however, that if the court shall find that the assessment of the value of the property of the party objecting was so high in proportion to other property assessed as to satisfy the court that the city council in equalizing the assessment had acted in bad faith, the entire tax of the objecting party shall be held void, and the costs shall be taxed against the city. * * *”

Appellants throughout this litigation have contended that the object of those statutory provisions was to protect the taxpayers' substantial rights.

Nowhere to Appellants' knowledge have they ignored or evinced dislike of that statute, nor have they ever sought herein to obtain refund of their respective payments of the taxes for either 1950 or 1951. All they seek is to protect their substantial rights, and to prevent Appellant Yakutat & Southern Railway's real property being sold to pay taxes at exorbitant over-valuations and over-assessments.

They do claim that that property was over-valued and over-assessed, illegally and in bad faith; but they have never sought to have the entire tax declared void as authorized by the last sentence of the above quotation from Sec. 16-1-124, ACLA 1949, even though they undoubtedly were entitled to do so under the admitted nonperformance of statutory and municipal requirements which are jurisdictional.

APPELLANTS' SECOND PROPOSITION.

Appellee (Bf. 8) admits that "identical procedure was used by the Appellee for all three years, except as follows". Thereby, Appellants submit, Appellee admitted as it did in Case No. 14,562 (Appellee Bf. 23), that the assessment for the years 1950 and 1951 was made by the Board of Equalization copying the work of the previous year of the assessor, and that no assessor made an annual assessment for either 1950 or 1951, as required by statute and ordinance.

Such admission was not clearly before this Honorable Court on the first appeal in USCA9C #13,455, 206 F.2d 612.

In view of Appellee's admission (PR 40, 90, 117, 196) that its Ordinance No. 1 was in effect during the pertinent tax years of 1950 and 1951, and made no proof of any amendment to permit posting under Sec. 16-1-124, ACLA 1949, Appellants submit that Appellee cannot now urge that it was so amended.

But even assuming without conceding that the notice was posted, that does not cure any of the other jurisdictional defects in the proceedings.

Appellee's Board of Trustees' Minute Books (PR 27-64) show no such amendatory ordinance having been enacted. Appellee's present City Clerk didn't know of any such ordinance (PR 206-207; also, 213).

It seems strange that neither the City Clerk nor the City Attorney knew positively of any such amendatory ordinance.

If one were in existence, the learned trial Court would have taken judicial notice of it, had Appellee stated its title and the day of its approval, under Section 55-5-12, ACLA 1949, viz:

“In pleading an ordinance or enactment of any incorporated city, town or village, or a right derived therefrom, in any action or proceeding, it shall be sufficient to refer to such ordinance or enactment by its title and the day of its approval, and the Court shall thereupon take judicial notice thereof.”

Inasmuch as this proceeding is derogatory of the common law, the burden was upon Appellee to prove that it had an effect an ordinance authorizing post-

ing of the notice and that it was in effect on and prior to October 15, 1952.

Despite Appellee or its counsel's self selection of the manner of applying the respective payments made by Appellants, the latter specifically tendered them in full payment, and not otherwise.

Appellants challenge Appellee's assertion (Bf. 6) that its Exhibit No. 1 of itself shows the claimed tax of \$2,021.20 for 1950 and of \$1,639.65 for 1951 to be balances upon real property taxes, and submit that, if such fact can be shown, it is only by incompetent, extrinsic or aliunde evidence (Appellants' Main Bf. p. 32).

Appellee also apparently contends that the cry of technical objections (Appellee's Bf. p. 6) meets the facts and the law in Appellants' Second Proposition (Main Bf. pp. 24-31). Appellants submit that Appellee's brief controverts neither those facts nor that law and that their objections are jurisdictional, not technical.

APPELLANTS' THIRD PROPOSITION.

Other than for its assertion (Bf. 6), Appellee neither controverts the facts nor the law in Appellants' Third Proposition (Main Bf. pp. 31-34), except it seeks to distort this Honorable Court's opinion in Case No. 13,455, 206 F2d 612, into upholding an invalid tax levied under a special proceeding, the jurisdictional steps whereof were not taken.

APPELLANTS' FOURTH PROPOSITION.

Appellee controverts neither the facts nor the law in Appellants' Fourth Proposition (Main Bf. 35-38), other than to intimate (Appellee's Bf. p. 10) that Appellants have misapplied Chief Justice Marshall's famous statement, "that the power to tax is the power to destroy" in *McCullough v. Maryland*, 4 Wheat. 579, 607, 17 U.S. 316, 331.

Appellants contend that citation is both correct and pertinent.

APPELLANTS' FIFTH PROPOSITION.

Appellee's only answer to Appellants' Fifth Proposition (Main Bf. 39-48) is that Section 12 of its Ordinance, Exhibit A (Appendix, p. x, Appellants' Main Brief) provides for interest on delinquent taxes of 1% monthly.

That section provides:

"On all delinquent taxes a penalty shall be added, which shall be a sum equal to interest at the rate of 12% per annum from the date of such delinquency."

The Order of Sale (PR 128-129) specifically allowed both taxes and penalty, although the Ordinance imposes no interest (Appellants' Main Bf. pp. 39, also 44).

APPELLEE'S CONCLUSION.

Appellants don't understand Appellee's charge (Appellee Bf. 11), that their counsel is seeking to emasculate a political subdivision of Alaska, because in Appellants' brief (p. 48) he stated:

“Appellee should have refunded Appellants' remittances if it did not accept that sum in full payment of Appellants' taxes.”

Appellants admit that Appellee, notwithstanding that before these proceedings were instituted and throughout them it was represented by learned practicing attorneys Wm. L. Paul, Jr., of Seattle and Juneau, and Fred Paul of Seattle, has entirely ignored all statutory and ordinance requirements not only in the purported over-assessment and over-valuation but in the preparation and presentation of these proceedings, and Appellants contend that all of those steps were jurisdictional; but, all they seek is to protect their substantial rights by not having the Appellant Yakutat & Southern Railway's real property sold for claimed taxes at exorbitant over-assessments and over-valuations. They admit the learned trial Court erred in granting Appellee's application and entering its Order of Sale.

The fact is, as everyone knows who knows anything about Alaska, that actually Appellants' property and industrial activities are the main, if not only, support of Appellee and its inhabitants and Appellants are much more interested in keeping Appellee in solvent condition than some of its present and former officials. Appellee seemingly desires to

over-assess and over-value its chief taxpayers' property in the hope of thereby putting them out of business and to its own destruction.

CONCLUSION.

Appellants respectfully renew their prayer that the Order of Sale (PR 128-129) may be vacated and set aside and Appellee's application be dismissed.

Dated, Juneau, Alaska,
April 29, 1955.

Respectfully submitted,
R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Appellants.

